9/case 415

Federal Labor Relations Authority

Washington, D.C. 20424

NUMBER 415 REPORT OF CASE DECISIONS December 24, 1986

UNFAIR LABOR PRACTICE CASES

24 FLRA No. 76 (December 23, 1986)

U.S. Customs Service, Washington, D.C. and National Treasury Employees Union, Case No. 9-CA-50404

24 FLRA No. 77 (December 23, 1986)

U.S. Immigration and Naturalization Service and American Federation of Government Employees, Local 1917, AFL-CIO, Case Nos. 2-CA-1151 and 2-CA-20037

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NEGOTIABILITY CASE

24 FLRA No. 81 (December 24, 1986)

American Federation of Government Employees, AFL-CIO, National Council of Social Security Field Office Locals and Department of Health and Human Services, Social Security Administration, Case No. 0-NG-1076

ARBITRATION CASES

24 FLRA No. 78 (December 24, 1986)

U.S. Department of Commerce, Patent and Trademark Office (PTO) and Patent Office Professional Association (POPA) (Johnson, Arbitrator), Case No. 0-AR-1176

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24 FLRA No. 79 (December 24, 1986)

U.S. Army Armament Research, Development and Engineering Center (ARDEC), Dover, New Jersey and National Federation of Federal Employees (NFFE), Local 1437 (Weaver, Arbitrator) Case No. 0-AR-1168

24 FLRA No. 80 (December 24, 1986)

American Federation of Government Employees, Local 916 and Department of the Air Force, Tinker Air Force Base, Oklahoma (Fogelberg, Arbitrator), Case No. 0-AR-1264

*Case No. 0-AR-1209 (Order Denying Motion for Reconsideration of 24 FLRA No. 15)

Local 1749, American Federation of Government Employees and Commander, 47FTW, Laughlin Air Force Base, Texas

Federal Labor Relations Authority

24 FLRA No. 76
Customs Service, Washington, D.C. and NTEU, Case No. 9-CA-50404 (Decided December 23, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
AGENCY ULP (ALLEGED) 7116(a)(2)	7116(a)(1) an (2)

- ELEMENTS OF DISCRIMINATORY MOTIVATION
  - AGENCY HAD KNOWLEDGE OF PROTECTED ACTIVITY
  - UNION ANIMUS

BACKPAY
- CRITERIA FOR BACKPAY AND RETROACTIVE PROMOTIONS
  - "BUT FOR" TEST
- REMAND TO ALJ TO MAKE APPROPRIATE DETERMINATIONS

DETAILS
- DISCRIMINATION FOR ENGAGING IN PROTECTED ACTIVITY

GRIEVANCE PROCEDURE, NEGOTIATED
- DISCRIMINATION FOR FILING A GRIEVANCE

UNFAIR LABOR PRACTICES, REMEDIES FOR AGENCY VIOLATIONS
- BACKPAY
  - REMANDED TO ALJ TO MAKE DETERMINATION

UNITED STATES CODE
- 5 U.S.C. 5596 [BACK PAY ACT]

DIGEST NOTES

The agency violated section 7116(a)(1) and (2) when it assigned two employees to details because they had filed grievances. The Judge found that the reasons given for the assignments were pretextual and that the assignments were based on anti-union animus. However, the Authority remanded the case to the Judge in order to make a determination under the Back Pay Act, 5 U.S.C. 5596, concerning whether the employees were affected by an unjustified or unwarranted personnel action that directly resulted in the loss or reduction in pay, allowances, or differentials. Such a determination is necessary for an award of backpay as a remedy.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

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24 FLRA No. 77

**Federal
Labor Relations
Authority**

**INS and AFGE, Local 1917, Case
Nos. 2-CA-1151 and 2-CA-20037
(Decided December 23, 1986)**

SUBJECT MATTER INDEX ENTRIES

- AGENCY ULP (ALLEGED) 7116(a)(5)
  - HEALTH AND SAFETY
  - PERFORMANCE APPRAISAL SYSTEM
- COLLECTIVE BARGAINING PROCESS AND THE DUTY TO BARGAIN
  - CONDITIONS OF EMPLOYMENT, CHANGES IN
    - MORE THAN A DE MINIMIS CHANGE
      - CRITERIA
        - TEMPORARY, RECURRING OR PERMANENT NATURE OF THE CHANGE
        - NATURE OF THE CHANGE
        - EXTENT OF PARTIES' PROCEDURES FOR ANALOGOUS CHANGES
  - LEVEL OF BARGAINING (LOCAL, NATIONAL , ANOTHER ACTIVITY, ETC.)
    - LOCAL SUPPLEMENTARY AGREEMENTS, CHANGES IN
      - WHERE ACTIONS AT AGENCY LEVEL RENDER LOCAL AGREEMENT MOOT
  - GROUND RULES
    - PRECLUDING AGENCY FROM ACTING UNTIL NEGOTIATIONS ARE COMPLETE
  - GOOD/BAD FAITH BARGAINING, INDICIA
    - PARTICIPATION IN FMCS PROCEEDINGS
    - PARTICIPATION IN FSIP PROCEEDINGS
    - ADVANCE NOTICE AND AN OPPORTUNITY TO BARGAIN
  - PROPOSALS
    - FAILURE TO MAKE TIMELY PROPOSALS
- HEALTH AND SAFETY
  - CHANGES IN CONDITIONS OF EMPLOYMENT AFFECTING HEALTH OR SAFETY
    - EXPOSURE TO POSSIBLE CRIMINAL ASSAULTS
- PERFORMANCE APPRAISAL SYSTEM
  - PERFORMANCE STANDARDS
    - ESTABLISHMENT AND REVISION
      - UNILATERAL CHANGES IN STANDARDS
- UNFAIR LABOR PRACTICES, REMEDIES FOR AGENCY VIOLATIONS
  - BARGAINING ORDER AND/OR NOTIFY UNION OF CHANGES
    - APPROPRIATE ARRANGEMENTS AND/OR PROCEDURES

STATUTE

7106(a)(2)(A) and (B)
7116(a)(1) and (5)

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

DIGEST NOTES

The agency did not violate section 7116(a)(1) and (5) when it replaced three local supplementary agreements to a master agreement with one document. The agency notified the union that the provisions of the local agreements had been rendered moot by the passage of time and by altered methods of operation. and that the provisions required changes in order to facilitate production. The parties met to begin negotiations but, when the local union's proposed ground rules which contained provisions that had the effect of precluding the agency from effectuating the proposed changes or procedures until complete agreement had been reached, the agency rejected the proposed ground rules and the parties reached impasse. The agency cooperated in both the procedures of the Federal Mediation and Conciliation Service and the Federal Service Impasses Panel. Following the abortive bargaining session over ground rules, the agency invited proposals from the local union but the union failed to submit any.

The agency violated section 7116(a)(1) and (5) when it unilaterally assigned unit employees to cashier duties in an area of its New York District Office unsecured by bullet-proof booths with silent alarm systems, and increased the number of required interviews to be performed by unit employees from 10 to 15. The unilateral increase in performance standards by fifty percent and the assignment of unit employees to unsecured work site abrogated the terms of preexisting local agreements. The duration of the changes was permanent, and the impact on the affected unit employees was immediate and significant. The employees assigned to the unsecured work had legitimate concerns for their safety in view of the fact that they handled large sums of money as cashiers and several agency employees had been robbed in the building where the unsecured work site was located.

Federal Labor Relations Authority

24 FLRA No. 78

Dept. of Commerce, Patent and Trademark Office and Patent Office Professional Association (Johnson, Arbitrator), Case No. 0-AR-1176 (Decided December 24, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
ARBITRATION, PROCEDURE	7114
TIMELINESS OF EXCEPTIONS	7122(a) and (b)
EFFECT OF MODIFICATION OF AWARD BY ARBITRATOR	

DIGEST NOTES

Only when a modification of an award by the arbitrator gives rise to the deficiencies alleged in exceptions to the award is the filing period for exceptions determined by the date of the modification. In this case where deficiencies alleged in exceptions were not related to the arbitrator's modification of his award, the filing period for filing exceptions began when the original award was served on all parties. Since the agency's exceptions were filed outside the filing period, the Authority dismissed the exceptions as untimely filed.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Federal Labor Relations Authority

24 FLRA No. 79

Army Armament Research, Development, and Engineering Center, Dover, N.J. and NFFE, Local 1437 (Weaver, Arbitrator), Case No. 0-AR-1168, (Decided December 24, 1986)

SUBJECT MATTER INDEX ENTRIES

- PROCEDURE
  - FORUMS
    - AUTHORITY LACKS JURISDICTION
      - REVIEW OF ARB. AWARDS [5 U.S.C. 7512 - MATTERS]
        - INTERPRETATION OF SETTLEMENT AGREEMENTS
- SETTLEMENT AGREEMENTS
  - GRIEVANCE SETTLEMENT AGREEMENTS
    - INTERPRETATION OF SETTLEMENT AGREEMENTS RE 5 U.S.C. 7512
- UNITED STATES CODE
  - 5 U.S.C. 7512
  - 5 U.S.C. 7703

STATUTE

7121(f)
7122(a)

DIGEST NOTES

The Authority is without jurisdiction to review an arbitrator's interpretation and application of a grievance settlement agreement relating to a matter (removal of the grievant) covered by 5 U.S.C. 7512.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Federal Labor Relations Authority

24 FLRA No. 80

AFGE, Local 916 and Dept. of the Air Force, Tinker Air Force Base, Okla. (Fogelberg, Arbitrator), Case No. 0-AR-1264 (Decided December 24, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
ARBITRATION, PROCEDURE TIMELINESS OF EXCEPTIONS APPEAL UNTIMELY FILED	7122(a) and (b)

The Authority dismissed the union's exceptions as untimely filed.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Federal Labor Relations Authority

24 FLRA No. 81

AFGE, National Council of Social Security Field Office Locals and HHS, SSA, Case No. 0-NG-1076 (Decided December 24, 1986)

SUBJECT MATTER INDEX ENTRIES

- ASSIGN WORK
  - HEALTH AND SAFETY
  - HOURS OF WORK
- COMPTROLLER GENERAL DECISIONS
  - 3 COMP. GEN. 433 (1924)
  - 45 COMP. GEN. 215 (1965)
  - 62 COMP. GEN. 278 (1984)
- CODE OF FEDERAL REGULATIONS
  - 41 C.F.R. 101-20.116-3
- FACILITIES, EQUIPMENT AND SERVICES
  - OFFICE/WORK SPACE
    - HEATING AND AIR CONDITIONING
- HEALTH AND SAFETY
  - VIDEO DISPLAY TERMINAL
    - BREAKS OR REST PERIODS
    - INCIDENTAL EQUIPMENT AND PROVISIONS RELATING TO VDT USE
- HOURS OF WORK
  - REST PERIODS AND BREAKS
    - ASSIGNMENT OF WORK DURING BREAKS
- MANAGEMENT RIGHTS: GENERALLY
  - DISCRETION OF MANAGEMENT
    - LACK OF "TOTAL" DISCRETION TO IMPLEMENT A PROPOSAL
- TECHNOLOGY OF PERFORMING WORK, NEGOTIABLE MANAGEMENT RIGHT
  - CRITERIA FOR DETERMINING INTERFERENCE WITH MANAGEMENT'S RIGHT
  - HEALTH AND SAFETY

STATUTE

7105(a)(2)(E)
7106(a)(2)(B)
7106(b)(1)

DIGEST NOTES

A proposal is negotiable that provides for periodic rest breaks for employees who work at video display terminals. Under the proposal, management retains its right under section 7106(a)(2)(B) to assign work during the breaks. Management could assign non-VDT work during the rest periods or, if workload requires, assign VDT work during the periods. (proposal 1)

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Several proposals are negotiable that relate to health and safety measures for employees who use video display terminals. The proposals are incidental to and not determinative of the VD technology adopted by the agency for the performance of work. The proposals do not interfere with the agency's right to determine the technology of performing its work within the meaning of section 7106(b)(1).

To sustain a claim that a proposal concerning conditions o employment is negotiable only at the election of management because it directly interferes with management's right to determine the technology used in performing its work, an agency must establish: (1) the technological relationship of the proposal to accomplishing or furthering the performance of the agency's work; and (2) how the proposal would interfere with the purpose for which the technology was adopted.

The agency claimed that under Comptroller General decisions it lacks authority to purchase the equipment specified in the proposals. Personal or special equipment may be purchased if th criteria established by the Comptroller General are met [63 Comp Gen. 278 (1984)]. Moreover, the Comptroller General has set forth criteria for determining circumstances in which an agency could purchase personal equipment in the absence of specific statutory authority [3 Comp. Gen. 433 (1924); 45 Comp. Gen. 215 (1965); 63 Comp. Gen. 278]. Thus, the agency has some, if not total discretion to purchase the equipment. The lack of total discretion to implement a proposal is not a basis for finding an otherwise negotiable proposal outside the duty to bargain. Lacking total discretion, the agency's duty to bargain extends t such matters as are within its discretion. (proposals 2 through 12)

A proposal is negotiable that provides that the office temperature will not be below 65 degrees and in hot weather, adequate ventilation and air conditioning will be provided. (proposal 13)

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. CUSTOMS SERVICE
WASHINGTON, D.C.

Respondent

and Case No. 9-CA-50404

NATIONAL TREASURY EMPLOYEES UNION

Charging Party

DECISION AND ORDER REMANDING CASE

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding, finding that the Respondent had engaged in the unfair labor practices alleged in the complaint and recommending that it be ordered to cease and desist therefrom and take certain affirmative action. Thereafter, the Respondent filed exceptions to the Judge's Decision and the Charging Party filed a response to the Respondent's exceptions.*/

We adopt the Judge's conclusion that the temporary details of employees Beebe and Thomas were based upon their participation in protected activities and that the reasons given by the Respondent for the details were pretextual. Therefore, we adopt his conclusion that the Respondent's conduct constituted a violation of section 7116(a)(1) and (2) of the Federal Service Labor-Management Relations Statute (the Statute), as alleged in the complaint.

The Judge, in addition to a cease and desist order, recommended that the Respondent be ordered to make whole employees Beebe and Thomas for any loss of overtime pay they would have earned but for their temporary details. As the Authority has previously held, in order for backpay to be authorized under the Back Pay Act, 5 U.S.C. § 5596, there must be a determination not only that an employee has been adversely affected by an unjustified or unwarranted personnel action, but also that but for the improper action the employee would not have suffered a loss or reduction in pay, allowances, or differentials. *Federal Aviation Administration, Northwest Mountain Region, Seattle, Washington and Federal Aviation Administration, Washington, D.C.*, 14 FLRA 644 (1984).

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*/ The General Counsel's motion to disregard the Respondent's exceptions and attached opposition to the Respondent's exceptions have not been considered because they were filed untimely. Therefore, it is unnecessary to consider the Respondent's response to the General Counsel's motion.

In this case, the Judge made his recommendation without applying the test. It is not clear from the record before us whether the Judge's recommendation meets the required standard.

Accordingly, we remand this case to the Judge for the limited purpose of applying the standard to the facts of this case to determine, based on the existing record, whether backpay is warranted.

ORDER

The complaint in Case No. 9-CA-50404 is remanded for action consistent with the above.

Issued, Washington, D.C., December 23, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

(24 FLRA No. 76)

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

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U.S. CUSTOMS SERVICE :
WASHINGTON, D.C. :
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Respondent :
:
and : Case No. 9-CA-50404
:
NATIONAL TREASURY EMPLOYEES UNION :
:
Charging Party :
:
. . . .

R. Timothy Shiels, Esquire
For the General Counsel

Patricia Olson, Esquire
For the Respondent

William Corman, Esquire
For the Charging Party

Before: BURTON S. STERNBURG
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. Section 7101 et seq. and the Rules and Regulations issued thereunder.

Pursuant to an amended charge first filed on August 22, 1985, by the National Treasury Employees Union (hereinafter called the NTEU or Union), a Complaint and Notice of Hearing was issued on October 18, 1985, by the Regional Director for Region IX, Federal Labor Relations Authority, San Francisco, California. The Complaint alleges that the U.S. Customs Service, Washington, D.C. (hereinafter called the Respondent or Customs), violated Sections 7116(a)(1) and (2) of the Federal Service Labor-Management Relations Statute (hereinafter called the Statute), by temporarily transferring unit employees Loran Beebe and Donald Thomas to different work locations because they had filed grievances against Respondent under the negotiated grievance procedure.

A hearing was held in the captioned matter on November 18, 1985, in Seattle, Washington. All parties were afforded the opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. The General Counsel and the Respondent submitted post-hearing briefs on December 18, 1985, which have been duly considered.[1]

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions, and recommendations.

Findings of Fact

The NTEU has been the exclusive representative in a nationwide consolidated unit of the Respondent's employees. The unit includes, among other employees, the custom inspectors working in the various ports within Respondent's Seattle, Washington District.

At all times material herein the NTEU and the Respondent have been parties to a collective bargaining agreement which contains a negotiated grievance procedure applicable to unit employees.

Mr. Loren Beebe, one of the alleged discriminatees, has worked in the Seattle District's Anacortes port as an inspector since 1971. He has served as president of the Seattle Chapter of NTEU. His most recent participation in protected activities was in connection with grievances challenging the Respondent's failure to award him overtime work during the fiscal year 1984. In February 1985, the NTEU elevated one of his grievances to arbitration.[2] The grievance challenged Respondent's staffing practice at the Anacortes port which resulted in Mr. Beebe being deprived of overtime work opportunities. In addition to the grievance which was elevated to arbitration, Mr. Beebe filed 21 additional grievances between June 25 and July 31, 1985, contending that he has lost overtime work opportunities because of the use of intermittent inspectors. These latter grievances are currently at the second step of the grievance procedure, awaiting a decision by District Director Robert Hardy.

Mr. Donald Thomas, the other alleged discriminatee, has worked in the District's Seattle port for the past 12 years. He has formerly been the Chief Steward for the Seattle Chapter of the NTEU. Like Mr. Beebe, he felt that his overtime earnings for the 1984 fiscal year had been improperly limited by Respondent and, like Mr. Beebe, he filed a grievance concerning such limitation. In April 1985 the NTEU invoked arbitration on Mr. Thomas' grievance. Subsequently, in October 1985, the parties entered into a settlement of the grievance, wherein the Respondent agreed to pay Mr. Thomas the sum of $820.96. Mr. Robert Hardy, the District Director, served as the hearing official at the second step of the grievance procedure on Mr. Thomas' grievance.

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[1] In the absence of any objection, General Counsel's Motion to Correct Hearing Transcript, should be, and hereby is, granted.

[2] This arbitration is still pending.

In connection with the filing of grievances by other employees within the unit, the only evidence bearing thereon appears in the testimony of Mr. Robert Hardy and Senior Customs Inspector Gerald Bergquist. Thus, Mr. Hardy testified that "lots of other inspectors" have filed grievances, "fifty percent" of which "concerned the denial of overtime." Mr. Bergquist, who was currently at the Harbour Island Port testified that he filed a grievance in August of 1985 concerning the "denial of overtime assignment." The grievance at the time of the hearing herein was at the 3rd step of the grievance procedure.

Other than the grievances of Mr. Beebe and Mr. Thomas, there is no record evidence indicating that any other grievances had been elevated to the final step of the grievance procedure, i.e. arbitration.

The record further reveals that overtime earnings represent a considerable portion of a custom inspector's income. Each year an inspector is entitled to earn up to $25,000 in overtime, a figure that is calculated on the fiscal year ending on September 30. Both Mr. Beebe and Mr. Thomas are high overtime earners. Thus, as of early September, 1985, Mr. Beebe had earned approximately $19,000 to $20,000 in overtime while Mr. Thomas had earned approximately $23,500 in overtime wages.

In order to insure that no inspector exceeds the $25,000 statutory overtime "cap" the Seattle District keeps daily records of each inspector's overtime earnings, using a daily "cap" of $68 to gauge the pace of each inspector's overtime earnings, since $68 x 365 = $24,820, approximately the yearly salary overtime "cap." As a consequence, an inspector's opportunity to earn overtime increases as the year progresses. Thus, the first day of the fiscal year an inspector is not allowed to earn more than $68 in overtime. The second day, assuming that he has not worked overtime, his daily cap would have doubled to $136. The record further indicates that overtime opportunities in the Seattle District increase as the fiscal year progresses because the District's busiest season begins in June, with August and September the last two months of the fiscal year, being the busiest months.

The Seattle District overtime assignments are made on a daily basis. Each day an inspector informs his supervisor as to whether he wants to work overtime that day, making himself either "available" or "not available." The assignments are then distributed inversely to the inspectors' cumulative overtime overtime earnings, that is, the top earner is at the bottom of the list.

Every two weeks the Respondent issues a "1911 Overtime Report" for each inspector, showing the inspector's overtime assignments and his overtime earnings for that two week period. The report also shows the port where the inspector worked during that two weeks and the inspector's hourly overtime rate, a rate that remains the same regardless of the port where the inspector maybe working.

During July and August, 1985, while NTEU was pushing Mr. Beebe and Mr. Thomas' arbitrations and while Mr. Beebe was filing his new overtime grievances, Mr. Robert Hardy instituted an "inter-port awareness program," which eventually sent Mr. Beebe and Mr. Thomas on temporary assignments. The program, announced in an August 2, 1985 memo, called for the detailing of inspectors to different ports to enhance their experience and to promote uniformity within Respondent's Seattle District. Mr. Beebe was temporarily traded for Charles Bowen of the Seattle port, while Mr. Thomas was traded for Bruce Hassebrock of the Blaine port. The assignments began on September 3, 1985 and lasted three weeks.[3] These four employees were selected from a pool of more than 80 inspectors working in the Seattle District. According to Mr. Hardy, when he was informed that there would be surplus funds available he decided to institute the transfer training program. The record reveals that this was first such program in to Seattle District. In the past, it appears that there had only been temporary transfers within the Seattle District to cover employee absentees.

Neither Mr. Beebe nor Mr. Thomas had any desire to go on their respective assignments. Mr. Beebe's was an unhappy experience that forced him to spend two weeks 90 miles away from home, separated from his wife, and living in a Seattle motel. Mr. Thomas has an eight year old son who spends two or three nights each week with him. During the three weeks he spent in Blaine, 125 miles from his home in Seattle, he was separated from his son and his community. When Mr. Thomas found out he was being sent to Blaine, he even tried to get an alternative assignment in Los Angeles where, at least, he would be near relatives. Their assignments were given to them without any prior warning or discussion.

On the other hand, even before Mr. Hardy issued his August 2, 1985 memo, management knew that both Mr. Bowen and Mr. Hassebrock would welcome the temporary transfer. Mr. Bowen had already attempted to fill a job vacancy in Anacortes and his supervisor, Mr. Tom Coleman, admitted that he wanted to go to Anacortes. While Bowen did not volunteer, in the strictest sense of the word, the record indicates that he would have if he had been given a chance. Mr. Hassebrock's supervisor also knew that he was interested in being sent to Seattle. In July, 1985, before he left on his three week vacation, Mr. Hassebrock told his supervisor, Mr. Eberhardt, that he was "definitely interested" in a temporary assignment to Seattle.

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[3] Mr. Beebe's assignment lasted only two weeks because of an earlier scheduled vacation.

This difference in treatment continued once these employees arrived at their temporary assignments. In Seattle, Mr. Beebe found himself restricted by supervisors Mr. Jack Lopez and Mr. Terry Millhouse as to the amount of "cargo discharge" work and "entering or clearing of vessels" work he was allowed to do on overtime, even though he had fourteen years of experience in that type of work and had been allowed by Mr. Lopez and Mr. Millhouse to do that work during regular hours. Mr. Hassebrock did not face similar limits on the type of overtime work he was allowed to do, testifying that "I could work any overtime that was available that I could do." Although Mr. Hassebrock testified that he, too, did not do any "vessel and cargo discharges" it was only because he did not have sufficient expertise for such assignments. Moreover, even though both Mr. Beebe and Mr. Thomas were available to work overtime every night, while Mr. Hassebrock was not available the entire first week, both earned less overtime during their details than either Mr. Bowen or Mr. Hassebrock.

NTEU challenged Respondent's discriminatory assignments of Mr. Beebe and Mr. Thomas, filing the present unfair labor practice on August 23, 1985. On behalf of Respondent, Mr. Hardy replied to the charges in an October 2, 1985 letter to Region 9 of the Authority, in which he offered the "specific reasons for the temporary reassignment of each employee." Mr. Hardy asserted that Beebe had been selected for the assignment so that he could train Seattle employees on aspects of the "oil program," while Mr. Thomas, as the inspector commanding the "greatest knowledge" of the Automated Commercial System (ACS),[4] had been selected to share this expertise with employees in Blaine, Washington. That same month Mr. Hardy also met with NTEU Chapter 164 President, Mr. William Keown, and again asserted the some reasons for the assignments.

Mr. Beebe was never informed of any alleged training duties and his assignment to Seattle port involved absolutely no training of other employees on the oil program. In fact, during Beebe's two-week assignment his only involvement with the Oil Program was a one and one half hour meeting with Customs Import Specialist Mr. Yamata wherein the oil program was discussed. Mr. Beebe himself had requested the meeting after he had learned of the temporary reassignment.

Mr. Thomas, like Mr. Beebe, did no training in his alleged area of expertise, the ACS, while on assignment to Blaine. During his three weeks in Blaine, Mr. Thomas spent only 30 minutes even discussing ACS with Blaine employees.

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[4] ACS and its predecessor, ACCEPT, are computer systems which Respondent uses to determine the extent to which an importer's shipment will be inspected.

Moreover, the evidence further establishes that Mr. Thomas was not an expert on ACS and that, in fact, if such expertise were required, there were more qualified inspectors available, including Inspectors Mr. Barry, Mr. Bjork, and Mr. Bergquist. Mr. Thomas' first experience with ACS (or its predecessor "ACCEPT") came in April, 1985 and he had a total of only 15 minutes of on-the-job experience by September 3, 1985, when he went to Blaine. During that time Mr. Thomas was the "outside man" at Respondent's "Transiplex" facility at the SEA-TAC airport. As both Mr. Thomas and, later Inspector Mr. Jack Bjork testified, the "outside man"'s ACS responsibilities are limited to one day every other week, when he relieves the "inside man," who is the one primarily responsible for ACS. Mr. Thomas had never been to any ACS training classes.[5]

Inspectors Mr. Robert Barry, Mr. Gerald Bergquist, and Inspector Mr. Bjork, on the other hand, had a great deal of experience and training in ACS and ACCEPT.[6] Three years ago Respondent sent Mr. Barry to San Diego for ACS training. He then returned to Seattle where he set up the ACS program and trained the first journeymen inspectors. Mr. Barry had also been the Seattle District's "training officer" from June 1983 to January, 1985, coordinating the District's training programs and often running specific training sessions. Because of his vast experience and training in ACS, Mr. Barry needed only minutes to reacquaint himself with ACS after being away from the system for two years. Inspector Bjork had attended an ACS training session in May, 1985 along with 15 other inspectors and had been working since that time as the "inside man" with Mr. Thomas at Transiplex. As noted earlier, it is the inside man who has primary responsibility for, and handles, the bulk of ACS work.

Inspector Bergquist has worked at Respondent's Harbour Island facility as the Senior Inspector of the Harbour Island ACS unit from June, 1985 to the present. Prior to becoming Senior Inspector, Mr. Bergquist spent three weeks as acting supervisor of the ACS unit. At Harbour Island, the ACS unit places between 6000-7000 monthly entries into ACS.[7] As

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[5] Concerning Mr. Thomas' alleged ACS qualifications, Mr. Hardy mistakenly recalled an ACS computer "demonstration" that Mr. Thomas had given to him. However, Mr. Thomas testified that he never even discussed ACS with Mr. Hardy and that the computer he had acquainted Mr. Hardy with was the Sealand System, which is totally unrelated to ACS. Mr. Thomas denied receiving any such ACS training and his denial stands uncontradicted on the record.

[6] Unless otherwise noted, "ACS" will be used for all future references of both ACS and ACCEPT.

[7] At the Transiplex, where Thomas gained his limited ACS experience, there are only 2,000 entries each month.

Senior Inspector of the ACCEPT unit Mr. Bergquist's responsibility included reviewing all ACS entries, and supervising the inspectors and the aides who work on the ACS computer.

Following the testimony of Mr. Barry, Mr. Bjork and Mr. Bergquist in the above respect, Mr. Hardy was recalled to the stand and offered new explanations for selecting Mr. Beebe and Mr. Thomas for the temporary details. With respect to Mr. Thomas, Mr. Hardy claimed that he had important supervisory skills. Mr. Hardy also referred to Thomas' "airport operation" experience, pointing out that it would be useful at a border port. However, Mr. Thomas was instructed to work simply "as a Senior Inspector in the Cargo Area." Moreover, with respect to knowledge of airport operations, both Mr. Bjork and Mr. Barry, who appear to have better ACS qualifications, also had working experience at the Sea-Tac Airport.

With respect to Mr. Beebe, at the hearing, Mr. Hardy no longer contended that Mr. Beebe was an oil expert, and instead claimed that Beebe had been sent to Seattle to improve his allegedly poor performance in a number of areas. However, Mr. Beebe received no training at all while in Seattle. Mr. Hardy also claimed that Beebe's high overtime earnings were causing a problem in staffing at Anacortes, suggesting that Mr. Beebe might reach the $25,000 cap in September, making it difficult to spread the overtime assignments. However, the evidence establishes that Mr. Beebe had only $19,000-$20,000 in overtime when he arrived in Seattle in September. Moreover, Mr. Hardy admitted that he had begun a program in 1985 at Anacortes using intermittent inspectors to handle overtime assignments in lieu of regular inspectors. There is no evidence that the intermittent inspectors were unavailable in September, 1985. However, Mr. Hardy further testified that the intermittents were not qualified for all jobs.

Mr. Hardy's only explanation for failure to include these new reasons in his October letter to the Region was that he had dictated the letter rather hurriedly.

Discussion and Conclusions

The General Counsel, citing, among other things, the protected activity of Mr. Beebe and Mr. Thomas, the timing of their details, the fact that Mr. Hardy's reasons for their selection do not withstand scrutiny, and the availability of more qualified teachers than Mr. Thomas, takes the position that the details of Mr. Beebe and Mr. Thomas were based solely on union animus and were therefore in violation of Section 7116(a)(1) and (2) of the Statute.

The Respondent on the other hand takes the position that the General Counsel has not established a prima facie case and therefore the complaint should be dismissed in its entirety. Additionally, the Respondent claims that the General Counsel has not established that the reasons proffered for the selection of Mr. Beebe and Mr. Thomas were "pretextual." Finally, the Respondent takes the position that even if it is established that Mr. Beebe and Mr. Thomas' grievances were a factor in their selection for the details, the record also establishes that "the action would have been taken in any event because of legitimate factors."

The record establishes that Mr. Beebe and Mr. Thomas had exercised their statutory right to file grievances and that Mr. Hardy, the District Director, the person responsible for selecting Mr. Beebe and Mr. Thomas for the temporary inter-port awareness program, was well aware of their respective protected activities.

The record further establishes that Mr. Hardy made the decision to select Mr. Beebe and Mr. Thomas for the temporary details without any consultation with Mr. Beebe and Mr. Thomas concerning such details. In contrast to the treatment accorded Mr. Thomas and Mr. Beebe, Mr. Hardy sought input from the supervisors in the Seattle and Blaine Ports relative to which employees should be detailed to the permanent locations of Mr. Beebe and Mr. Thomas.[8] Thus, while the swap was voluntary as to Mr. Beebe and Mr. Thomas' temporary replacements, it was mandatory as to Mr. Beebe and Mr. Thomas and resulted in undue hardships upon them.

The record further reveals, that, according to Mr. Hardy, he selected Mr. Beebe and Mr. Thomas for the inter-port transfers in order to utilize their expertise in the ports of Blaine and Seattle. Thus, Mr. Beebe was to train employees in Seattle on the "oil program" while Mr. Thomas was to train the Blaine Port employees on the ACS system. However, in practice, neither Mr. Beebe nor Mr. Thomas was programmed to impart their alleged respective knowledge of the oil program and ACS system to the employees working in the Seattle and Blaine Ports. In fact the record further establishes that Mr. Beebe only contact with the oil program while in Seattle was a one and one half hour discussion with an import oil specialist which he requested after he had been informed of his temporary assignment.

With respect to Mr. Thomas, who was allegedly selected for a temporary detail to Blaine because of his ACS expertise, the record reveals that he was far from an ACS expert, having had only fifteen minutes on-the-job training on ACS. The record further reveals that other employees were much more versed in the ACS system and that such employees has actually undergone formal training on the ACS system.

Finally, with regard to Mr. Hardy's testimony that one of the reasons for the temporary transfers of Mr. Beebe and Mr. Thomas was their proximity to the $25,000 overtime cap, the record reveals that Mr. Beebe as of

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[8] The supervisors indicated that they had employees under their supervision who had indicated a desire for such training details.

September 3, had only earned nineteen or twenty thousand dollars in overtime. Accordingly, multiplying $68 by 27, the remaining days of the fiscal year, would therefore only give him less than $22,000 in overtime earning for the entire fiscal year, several thousand dollars less than $25,000 the overtime cap.

Based upon the record as a whole and particularly the foregoing considerations, I find, contrary to the contention of the Respondent, that the preponderance of the evidence supports the conclusion that the temporary details of Mr. Beebe and Mr. Thomas were based upon their participation in activities protected by the Statute, namely the filing of grievances. I further find that the reasons assigned by Respondent for their respective details were a pretext and that but for Mr. Beebe and Mr. Thomas' participation in protected activities they would not have been involuntarily detailed to the Blaine and Seattle Ports. In such circumstances, I further find that the Respondents selection of Mr. Beebe and Mr. Thomas for their respective details was based upon union animus and hence violative of Sections 7116(a)(1) and (2) of the Statute.

Accordingly, it is hereby recommended that the Federal Labor Relations Authority issue the following Order designed to effectuate the purposes and policies of the Statute.

ORDER

Pursuant to Section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and Section 7118 of the Statute, the Authority hereby orders that the U.S. Customs Service, Washington, D.C. shall:

1. Cease and desist from:

    (a) Discriminating against Donald Thomas, Loren Beebe, or any other unit employees with regard to temporary assignments, details, or other conditions of employment because of their action in filing grievances or participating in other activities protected by the Statute.

    (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute.

    (a) Make whole Donald Thomas and Loren Beebe for any loss of overtime pay they would have earned but for their temporary details during the period September 3, 1985 to September 21, 1985.

(b) Post at all its locations within the Seattle, Washington District copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the District Director, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places were notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director for Region IX, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Burton S. Sternburg

BURTON S. STERNBURG
Administrative Law Judge

Dated: January 31, 1986
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT discriminate against Donald Thomas, Loren Beebe, or any other unit employees with regard to temporary assignments, details, or other conditions of employment because of their action in filing grievances or participating in other activities protected by the Statute.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL make whole Donald Thomas and Loren Beebe for any loss of overtime pay they would have earned but for their temporary details during the period September 3, 1985 to September 21, 1985.

____
(Agency or Activity)

Dated: ____________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region IX, whose address is: 530 Bush Street, Room 542, San Francisco, CA 94108 and whose telephone number is: (415) 556-8106.

24 FLRA No. 77

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. IMMIGRATION AND
NATURALIZATION SERVICE

Respondent

and

Case Nos. 2-CA-115
2-CA-20

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 1917, AFL-CIO

Charging Party

DECISION AND ORDER

I. Statement of the Case

These consolidated unfair labor practice cases are before the Authority on exceptions to the attached Administrative Law Judge's Decision filed by the Respondent The General Counsel alleged that the Respondent had violate section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) in both cases, a the Judge sustained those charges.

II. Background

The parties stipulated that the American Federation o Government Employees, AFL-CIO, through its National Immigration and Naturalization Service Council, is the exclusive representative for a nationwide unit of U.S. Immigration and Naturalization Service (INS) personnel, and that the parties operated under a nationwide collective bargaining agreement during the time period in question. T parties stipulated further that the Respondent recognized American Federation of Government Employees, Local 1917, AFL-CIO (Local 1917), as the agent of the exclusive representative and as the bargaining representative of its employees in the New York District. Article 34 of the national agreement expressly provided for the negotiation o supplemental local agreements to cover matters of local concerns. The national agreement also provided a mechanism for management to initiate interim changes in terms and conditions of employment when required.[1]

Under the provisions of the national agreement, Local 1917 and the Respondent's New York District Office executed local agreements characterized as memoranda of understanding. Those memoranda concerned the processing of applications for the adjustment of immigrant status, training procedures, and other matters.

Several months after the memoranda of understanding were executed, the Respondent's Acting Director of the New York District Office notified Local 1917 that certain provisions of the memoranda of understanding had been rendered moot by the passage of time and by altered methods of operation, and that other provisions required changes in order to facilitate production. The Acting District Director indicated that the Respondent intended to replace the memoranda of understandin with one document, and explained in some detail the changes it wished to effectuate. The notice regarding the proposed changes closed with a specific reference to the Respondent's alleged right to effectuate modifications "of this agreement in accordance with Article 3, Section G of the national agreement.2/ In response, Local 1917 advised management that it had no right to rescind the three memoranda of understanding unilaterally, challenged management's characterization of provisions of the memoranda as "moot," and suggested that the memoranda should remain in effect or, alternatively that the parties begin negotiations under Article 3, Section G. The Respondent replied with a detailed analysis of the memoranda and its position on each provision. The Responden contended, essentially, that some matters contained in the previously negotiated memoranda were not negotiable, that some provisions had been rendered moot by changed conditions and that some of the original provisions were acceptable upo reconsideration. Local 1917, in turn, replied by demanding negotiations pursuant to Article 3, Section G of the nationa agreement.

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[1] ARTICLE 3 - Union Relations at the National, Regional and Local Levels

G. The parties recognize that from time to time during the life of the agreement, the need will arise for management to change existing Service regulations covering personnel policies, practices, and/or working conditions not covered by this agreement. The Service shall present the changes it wishes to make to existing rules, regulations, and existing practices to the Union in writing. The Service recognizes that this obligation exists at the National, Regional and District levels when such changes are to be made. The Union will present its views (which must be responsive to either the proposed change or the impact of the proposed change) within a set time after receiving notice from management of the proposed change. The time will be:

22 Work Days at National Level
10 Work Days at Regional Level
10 Work Days at District Level

If disagreement exists, either the Service or the Union may serve notice on the other of its interest to enter into formal negotiations on the subject matter. The Union will request negotiations within 5 work days of receipt of the Service response. Such negotiations must begin within 5 work days of receipt by the other party of a request to negotiate. Reasonable extensions of these time limits may be granted on request.

The parties met to begin negotiations but, when Local 1917 proposed ground rules which contained provisions that had the effect of precluding the Respondent from effectuating the proposed changes or procedures until complete agreement had been reached, the Respondent rejected the proposed ground rules and the parties reached impasse. Local 1917 invoked the assistance of the Federal Mediation and Conciliation Service but, despite the assistance of an assigned mediator, the parties remained at impasse.

One week after the abortive bargaining session which resulted in impasse over ground rules, the Respondent notified Local 1917 that it would implement its proposed procedures to replace the three memoranda of understanding i two weeks, and invited bargaining during that two-week period. Local 1917 did not submit any bargaining proposals. The Respondent then implemented its plan for changes. Subsequently, Local 1917 formally requested assistance from the Federal Service Impasses Panel (FSIP) concerning the impasse over ground rules, but the FSIP declined jurisdiction on the ground that there was a threshold question concerning management's obligation to bargain over the proposed ground rules which had to be resolved before

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2/ *See* footnote 1 above.

the FSIP would assert jurisdiction. These circumstances led to the Union's charge in Case No. 2-CA-1151.

The original local memoranda of understanding provided, in part, that employees would be required to perform 10 case interviews each day, and that unit employees would not be required to perform cashier duties on the 10th floor of the Respondent's New York District Office, which had no bullet-proof booths with silent alarm systems, before any were installed. The Respondent's proposed changes, which led to the invocation of bargaining entitlement under Article 3, Section G of the national agreement, included no mention of either of these provisions. Later, however, the Respondent unilaterally increased the number of daily case interviews required from 10 to 15, and began to assign unit employees to 10th floor cashier duty despite the absence of a silent alarm system, with neither prior notice to Local 1917 nor an opportunity for the latter to request negotiations concerning procedures and appropriate arrangements for adversely affected unit employees. These circumstances led to the Union's charge in Case No. 2-CA-20037.

III. Case No. 2-CA-1151

A. Decision of the Administrative Law Judge

The Judge found that the Respondent had abrogated or repudiated three previously negotiated memoranda of understanding in their entirety, and substituted one of its own, without bargaining with the exclusive representative as required. On that basis, he found that the Respondent had violated section 7116(a)(1) and (5) of the Statute.

B. Positions of the Parties

In this case, the Respondent argues that the Judge erred in finding that it failed to afford the Union advance notice and an opportunity to negotiate with regard to proposed changes in the provisions of memoranda of understanding discussed in general terms above. The Respondent argues further that the Judge erroneously found the memoranda of understanding to constitute, in effect, a complete collective bargaining agreement which could not be changed without violating the national agreement, and that he erred in failing to rule on the negotiability of the terms of the memoranda and the Union's proposal.

The other parties made no submissions regarding the Judge's decision in this case.

C. Analysis

We find that the Respondent satisfied any bargaining obligation it may have had under the circumstances of this case before implementing revised procedures for the New York District Office. The Respondent first gave Local 1917 notice of its intention to revise the three memoranda of understanding by replacing them with one document, and then provided Local 1917 with a detailed description of the changes it proposed to make, together with an explanation of its reasons for such changes. Additionally, the Respondent agreed to meet and negotiate with Local 1917, consistent with Article 3, Section G of the national agreement, and in fact did so.[3] When negotiations began, the Union's only proposals would have precluded the Respondent from effectuating any change until complete agreement had been reached. See Division of Military and Naval Affairs, State of New York, Albany, New York, 8 FLRA 307, 320 (1982).

The Respondent then delayed implementation of the revised provisions for three weeks. During that time, it invited Local 1917 to submit bargaining proposals, but the Union never did so. The Respondent also participated in efforts by the Federal Mediation and Conciliation Service to resolve the parties' impasse over Local 1917's ground rules demands. Finally, consistent with its two weeks' advance notice to Local 1917, and in the absence of either proposals from or invocation of FSIP's processes by Local 1917 during that period, the Respondent implemented its revised procedures.

Assuming without deciding that the Respondent had a duty to bargain with Local 1917, the authorized and recognized agent of the exclusive representative at the national level concerning the negotiation of local supplemental agreements covering employees in the New York District Office, the Authority concludes that, under the circumstances, the Respondent satisfied any such bargaining obligation before implementing the revised procedures for its New York District Office. Accordingly, the Authority cannot find that the Respondent violated section 7116(a)(1) and (5) of the Statute, as alleged by the General Counsel. See, for example, Department of Defense, Department of the Navy, Naval Ordnance Station, Louisville, Kentucky, 17 FLRA 896 (1985), and the cases it cites. The complaint in Case No. 2-CA-1151 must therefore be dismissed.[4]

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[3] There is no dispute, and in the Authority's view it is unnecessary to determine, whether the Respondent properly could have effected the change it desired under the terms of the collective bargaining agreement then at mid-term, since both parties held themselves bound by Article 3, Section G of that contract.

IV. Case No. 2-CA-20037

A. Decision of the Administrative Law Judge

In Case No. 2-CA-20037, the Judge found that the Respondent assigned unit employees to cashier duties in an area of its New York District Office unsecured by bulletproof booths with silent alarm systems, and increased the number of required interviews to be performed by unit employees each day from 10 to 15. In both instances the Respondent acted without affording the exclusive representative notice and an opportunity to bargain concerning procedures and appropriate arrangements for unit employees adversely affected by these unilateral changes to their memoranda of understanding. On that basis, he found that the Respondent had violated section 7116(a)(1) and (5) of the Statute in this case, too.

B. Positions of the Parties

In this case, the Respondent argues that the Judge erred in finding that the Respondent failed to afford the Union notice of its proposed action to terminate certain specific provisions of the memoranda involving rights not reserved to management by section 7106(a) of the Statute. It also argues, in the alternative, that the Judge erred in finding that the three memoranda constituted a complete collective bargaining agreement which could not be changed.

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[4] We see no merit in the Respondent's argument that the Judge erred in finding that the memoranda of understanding constitute, in effect, a complete collective bargaining agreement which could not be changed without violating the national agreement. The Judge specifically rejected the Respondent's earlier, opposite contention that he should make such a finding. He found instead that abrogation of the memoranda constituted the violation of a statutory right. In any event, we disagree with the Judge and find no violation of the Statute by the Respondent as alleged in this case.

We also see no merit in the Respondent's contention that the Judge should have ruled on the negotiability of the terms of the memoranda and the Union's proposal. As the Judge noted, the "real issue" in this case is whether the Respondent gave the Union notice of its proposed changes and an opportunity to negotiate. He found that neither was given. Since we have found, to the contrary, that the Respondent did not fail to give notice or negotiate, it is unnecessary to make individual negotiability determinations here.

The other parties made no submissions regarding the Judge's decision in this case either.

C. Analysis

The General Counsel's charge in this case relates to the Respondent's alleged failure to give Local 1917 notice and an opportunity to bargain concerning the impact and implementation of its unilateral decisions to change the number of required daily interviews from 10 to 15 and to require cashier duty on the 10th floor despite the absence of bulletproof booths with silent alarm systems. The Authority agrees with the Judge's conclusion that the Respondent's unilateral changes were violative of the Statute.

The Authority has recently reassessed and modified the standard previously used to identify changes in conditions of employment which require bargaining. In Department of Health and Human Services, Social Security Administration, 24 FLRA No. 42 (1986), we said:

> In order to determine whether a change in conditions of employment requires bargaining . . ., the pertinent facts and circumstances presented in each case will be carefully examined. In examining the record, we will place principal emphasis on such general areas of consideration as the nature and extent of the effect or reasonably foreseeable effect of the change on conditions of employment of bargaining unit employees. Equitable considerations will also be taken into account in balancing the various interests involved.
>
> As to the number of employees involved, this factor will not be a controlling consideration. It will be applied primarily to expand rather than limit the number of situations where bargaining will be required. For example, we may find that a change does not require bargaining. However, a similar change involving hundreds of employees could, in appropriate circumstances, give rise to a bargaining obligation. The parties' bargaining

history will be subject to similar limited application. As to the size of the bargaining unit, this factor will no longer be applied.

Applying the revised standard to this case, we find based on the facts and circumstances that the nature and extent of the changes gave rise to a duty to bargain. The Respondent unilaterally increased the performance standard of bargaining unit employees by fifty percent and assigned other unit employees to an unsecured work site, thereby abrogating the terms of the preexisting local agreements. The duration of these unilateral changes was permanent, and the impact on the affected unit employees was immediate and significant. In addition, as noted by the Judge, the employees assigned to the unsecured work site had legitimate concerns for their safety in view of the fact that they handled large sums of money as cashiers and several employees of the Respondent had been robbed in the building where the unsecured work site was located. Therefore, we find that the Respondent violated section 7116(a)(1) and (5) of the Statute, as alleged by the General Counsel and found by the Judge in Case No. 2-CA-20037.[5]

V. Conclusion

Based on the considerations and analysis set forth above, the Authority concludes that the record in Case No. 2-CA-1151 does not establish that the Respondent violated section 7116(a)(1) and (5), as alleged in the complaint. The Authority concludes further, however, in agreement with the Judge, that the record in Case No. 2-CA-20037 does establish that the Respondent violated section 7116(a)(1) and (5) of the Statute.

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[5] The Respondent's alternate argument, namely, that the Judge erred in finding that the three memoranda of understanding constituted a complete collective bargaining agreement which could not be changed, lacks any merit in Case No. 2-CA-20037 for the same reasons as in Case No. 2-CA-1151, discussed in footnote 4 above. Moreover, regardless of whether the Judge made such an error in this case, we can discern no reason to find it to be reversible error in view of our finding that the Respondent did violate section 7116(a)(1) and (5) of the Statute by not affording Local 1917 its notice-and-opportunity-to-negotiate rights with respect to the two specific provisions discussed in the text above.

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority orders the U.S. Immigration and Naturalization Service to do as follows:

1. Cease and desist from:

(a) Unilaterally implementing changes in the working conditions of unit employees without first notifying the American Federation of Government Employees, Local 1917, AFL-CIO, the designated agent of the employees' exclusive representative, and affording it the opportunity to negotiate concerning the changes themselves and/or the procedures and appropriate arrangements for employees adversely affected by such changes, as required by the Statute.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request of the American Federation of Government Employees, Local 1917, AFL-CIO, the designated agent of the employees' exclusive representative, negotiate concerning procedures and appropriate arrangements for employees who have been or may be adversely affected by the unilateral changes in their performance standards and/or work locations.

(b) Post at its New York District Office copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Respondent's New York District Director, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region

II, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

IT IS FURTHER ORDERED that the allegations of the complaint in Case No. 2-CA-1151 are dismissed.

Issued, Washington, D.C. December 23, 1986.

J L Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

(24 FLRA No. 77)

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally implement changes in the working conditions of unit employees without first notifying the American Federation of Government Employees, Local 1917, AFL-CIO, the designated agent of the employees' exclusive representative, and affording it the opportunity to negotiate concerning the changes themselves and/or the procedures and appropriate arrangements for employees adversely affected by such changes, as required by law.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights under the Federal Service Labor-Management Relations Statute.

WE WILL, upon request of the American Federation of Government Employees, Local 1917, AFL-CIO, the designated agent of the employees' exclusive representative, negotiate concerning procedures and appropriate arrangements for employees who have been or may be adversely affected by the unilateral changes in their performance standards and/or work locations.

(Activity)

Dated: ______________ By: ______________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region II, Federal Labor Relations Authority, whose address is: 26 Federal Plaza, Room 3700, New York, New York 10278 and whose telephone number is: (212) 264-4934.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, DC 20424

. . . .

U.S. IMMIGRATION AND NATURALIZATION SERVICE

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1917, AFL-CIO

Charging Party

Case Nos.: 2-CA-1151
2-CA-20037

. . . .

Lee Mingledorff, Esq.
For the General Counsel

Sheldon Dorn
For the Charging Party

Carol D. Chasse and
William D. Tedrick, Esq.
For the Respondent

Before: ELI NASH, JR.
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute (hereinafter referred to as the Statute), Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. Section 7101, et seq.

The original charge in Case No. 2-CA-1151 was filed by the American Federation of Government Employees, Local 1917, AFL-CIO (hereinafter referred to as the Union or the Charging Party) against the U.S. Immigration and Naturalization Service (hereinafter referred to as

Respondent or Management) on August 6, 1981 and amended on October 23, 1981. The original charge in Case No. 2-CA-20037 was filed by the Union against Respondent on October 15, 1981. On November 24, 1981 the Regional Director, Federal Labor Relations Authority, issued an Order Consolidating Cases, Complaint and Notice of Hearing with respect to Case Nos. 2-CA-1119 and 2-CA-1151. On December 2, 1981 the Regional Director, Region II issued an order amending said Complaint. On December 18, 1981 Respondent filed its Answer denying the commission of an unfair labor practice. On January 19, 1982 Respondent filed an addendum to its Answer denying the commission of a section 7116(a)(5) violation. On January 12, 1982, the Regional Director issued an Order Severing Case No. 2-CA-1151 based upon the parties agreement to pursue a stipulated record in the matter. On July 28, 1982, the Regional Director issued a Complaint and Notice of Hearing in Case No. 2-CA-20037. On August 20, 1982, Respondent filed its Answer to the July 28, 1982 Complaint, denying the commission of an unfair labor practice. On October 6, 1982, the Acting Regional Director issued an Order Consolidating Cases with respect to Case Nos. 2-CA-1151 and 2-CA-20037. On March 17, 1983 the Regional Director issued an Order Scheduling Cases for Hearing.

The Complaints in this matter allege that Respondent unilaterally changed "Walk-In One Step" procedures by assigning unit employees to work as cashiers on the tenth floor and increased the number of case interviews which unit employees would be required to complete each work day without affording the Union the opportunity to negotiate concerning the impact and implementation of the changes; and, that Respondent and the Union negotiated and became parties to three (3) written agreements concerning, inter alia procedures for processing certain applications in the Travel Control Branch, which procedures are negotiable as to consistence and negotiable within the meaning of section 7106(b)(1) and (2) of the Statute; that Respondent unilaterally implemented changes in procedures which were inconsistent with the negotiated procedures; and that the changes were implemented without good faith negotiations concerning the desire to alter the terms of the agreements.

A hearing was conducted on May 19, 1983 in New York, New York, at which time all parties were represented and afforded full opportunity to adduce evidence, call, examine, and cross-examine witnesses, and argue orally. Briefs were filed by Respondent and Counsel for the General Counsel.

Upon the entire record in this matter, my observation of the witnesses and their demeanor, and from my evaluation of the evidence, I make the following findings of fact, conclusions of law, and recommendation:

Findings of Fact

The basic facts in this matter were stipulated by the parties. In addition to that stipulation certain findings of fact not contained in that stipulation were deemed necessary by the undersigned. Those findings are included herein.

1(a). At all times material herein, the American Federation of Government Employees, AFL-CIO, through the National Immigration and Naturalization Service Council has been and is now the exclusive bargaining representative for a nationwide unit of all personnel of the Immigration and Naturalization Service excluding those employees assigned to Border Patrol Sectors and those excluded from coverage by the Civil Service Reform Act.

1(b). At all times material herein, Respondent has recognized the Charging Party as the agent of the exclusive representative and as bargaining representative for its employees in the New York District, Immigration and Naturalization Service.

2. At all times material herein, the parties have been operating under a nationwide collective bargaining agreement, executed on June 13, 1979 and extending for a three (3) year period. The provisions of the agreement have been continued in effect by the parties pending negotiations for a new agreement.

3. The Travel Control Branch of the New York District, Immigration and Naturalization Service was comprised, at all times material herein, of four (4) major examination units: The I-130 unit; the I-140 unit; the 245 unit; and the Non-Immigrant unit. The I-130 unit processed petitions involving relatives in the US; the I-140 unit processed petitions involving work in the US; the 245 unit processed combined applications involving both I-130 or I-140 petitions plus an I-485 adjustment of immigrant status petition; and the Non-Immigrant unit processed petitions for short-term stays which did not require an adjustment of status.

4. The 245 unit combined application procedure, referred to above involved either pre-scheduled, calendared interviews or "one-step" applicants who were walk-ins without pre-scheduled interviews. This "one-step" procedure was initially implemented on or about December 1, 1980. Prior to that time, only pre-scheduled interviews were handled by the 245 unit.

5. On or about May 10, 1980, Charging Party and Respondent negotiated and entered an agreement entitled "Memorandum Of Understanding" which concerned various procedures to be used in the Travel Control Branch. These included _inter alia_, certain 245 unit procedures,[1] provisions for

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[1] The specific procedures the parties are referring to are not readily apparent from the record.

emporary rotation of other employees into the 245 unit,[2] and cross
raining of employees in work done by other units.[3]

6. In or about September, 1980, the parties negotiated and entered
nto an agreement entitled "Training Agreement Travel Control Branch New
ork District" which covered various aspects of employee training
ncluding the cross training noted above.

7. On or about November 5, 1980, Henry Dogin, then New York District
irector, issued a memorandum concerning implementation of the new
one-step" procedure referred to above. On or about November 24, 1980,
he parties negotiated and entered an agreement entitled "Negotiated
greement on 'One-Step' Examination in New York District." This agreement
ertained to the 245 unit and the new combined "one-step" application
rocedure being implemented there.

8. By letter dated June 9, 1981, Respondent's Acting Director, New
ork District, John J. Gaffrey, notified the Union that it felt certain
rovisions of the three (3) previously negotiated agreements, which
ncluded: the May 10, 1980 memorandum of understanding; the one step
rocedure and training were moot and other provisions needed change in
rder to facilitate production in Travel Control. Respondent stated its
ntent to replace the three (3) agreements and to rescind the Dogin's
etter of November 15, 1980 and replace these memoranda with one
ocument. Respondent enclosed its proposals for consideration. They
ere, in pertinent part, as follows:

> "2. All officers assigned to the Travel Control Section of the New York District Office will be expected to participate in the processing of combined applications on an as needed basis.
>
> "3. Cases will be calendared and/or interviews conducted on the basis of a four day week (Monday through Thursday). Friday will be a non-interview and/or calendar day enabling officers to work on back logs and pending cases.

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[2] 6) reads, in pertinent part, as follows: ". . . no examiner who
not permanently assigned to the Section 245 Unit will be assigned to
rk in Section 245 more than one day a week. . . . All Immigration
aminers shall be rotated equitably into the Section 245 Unit."

[3] 9) reads as follows: ". . . agree that all Immigration Examiners
hall complete a cross training program that will be negotiated within 60
ys. . . ."

"4. Every effort will be made to insure that Travel Control officers who have no experience in adjudicating combined applications be trained in the proper procedures relative to combined processing.

"5. New duties assigned to applications clerks as a consequence of one-step should be listed by Travel Control supervisors and forwarded to the Regional Office for review by classification.

"6. Premature status report requests (prior to published processing periods) from outside the federal government need only be filed.

"7. A one-step, walk-in applicant will be directed from the Information Unit on the first floor to Room 10-104 of Travel Control. An application clerk will review the application, for completeness. If not complete, the applicant will be informed of deficiencies and told to return with all documentation. If complete, the application will be receipted and placed in chronological order.

"8. An immediate search of MIRAC will be made to ascertain the existence of an "A" file. If none exists, a file will be created through a block of "A" numbers issued to Travel Control by RAIS. If a file exists, a check will be made of the file shelf for file location. If the file is in the file room, it will immediately be charged to Travel Control. If in an operating unit, a search for the file will commence immediately by the designated "One-step" file clerk. If the file is in another Service office, a request for the file transfer will be made via MIRAC. The interview will proceed through the creation of a work folder. If the file is in the Federal Records Center, the interview will proceed through the creation of a work folder. In all cases where the file is not readily available (FRC, other Service office, etc) a MIRAC print out with pertinent biographical data will be included in the work folder.

"9. Applicants will be referred to the third floor for acceptance of fees until a secure area for acceptance of fees is provided on the tenth floor.

"10. It is understood by the parties that the provisions of this agreement may be modified by Management in accordance witt (sic) Article 3, Section G[4] of the National Agreement."

9. By correspondence dated June 17, 1981, the Union responded as ollows:

> "IF YOU WISH TO MEET INFORMALLY TO INFORM US OF YOUR REASONS FOR REQUESTING THESE CHANGES BE ADVISED THAT I WILL ACCOMMODATE ANY GOOD FAITH ATTEMPT AT RESOLVING OUR DIFFERENCES.
>
> "IN THE MEANTIME BE ADVISED THAT YOU DO NOT HAVE THE AUTHORITY TO UNILATERALLY RESCIND ANY MEMORANDUM OF UNDERSTANDING REACHED WITH THIS LOCAL AND UNTIL SUCH TIME AS THESE MEMORANDA ARE CHANGED THROUGH GOOD FAITH NEGOTIATIONS, THEY WILL REMAIN IN EFFECT.

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[4] Article 3, Section G of the National agreement reads as follows:

> "The parties recognize that from time to time during the life of the agreement, the need will arise for management to change existing Service regulations covering personnel policies, practices, and/or working conditions not covered by this agreement. The Service shall present the changes it wishes to make to existing rules, regulations, and existing practices to the Union in writing. The Service recognizes that this obligation exists at the national, Regional and District level when such changes are to be made. The Union will present its views (which must be responsive to either the proposed change or the impact of the proposed change) within a set time after receiving notice from management of the proposed change. . . .
>
> "If disagreement exists, either the service or the Union may serve notice on the other of its interest to enter into formal negotiations on the subject matter. The Union will request negotiations within 5 work days of receipt of the Service response. Such negotiations must begin within 5 work days of receipt by the other party of a request to negotiate. . .
>
> "Nothing in the foregoing shall require either party to negotiate on any matter it is not obligated to negotiate under applicable law."

> "IT IS NOTED THAT YOU REFER TO MANY OF THE PROVISIONS CONTAINED IN THE REFERENCED THREE MEMORANDA OF UNDERSTANDING AS "MOOT". MY DEFINITION OF "MOOT" IS A SITUATION THAT IS NO LONGER APPLICABLE AND I HAVE SEARCHED THE THREE DOCUMENTS IN VAIN FOR PROVISIONS THAT ARE "MOOT." IT WOULD BE HELPFUL IF YOU COULD SPECIFY THE PROVISIONS YOU ARE REFERRING TO SO THAT YOUR CLAIM COULD BE EXAMINED.
>
> "IN REVIEWING THE THREE DOCUMENTS I FIND THAT THEY ARE AS WELL SUITED TO THE NEEDS OF OUR EMPLOYEES IN TRAVEL CONTROL AS THEY WERE ON THE DAY THEY WERE ADOPTED. THERE IS NO INDICATION IN YOUR LETTER OF ANY CHANGE THAT WOULD NECESSITATE REVIEW OF THESE MEMORANDA BUT I AM NONETHELESS PREPARED TO LISTEN TO YOUR REASONS FOR REMOVING ITEMS AND CHANGING OTHERS.
>
> "IN THE ABSENCE OF ANY JUSTIFICATION FOR THE DRASTIC CHANGES YOU SUGGEST I PROPOSE THAT THE THREE MEMORANDA OF UNDERSTANDING REMAIN IN FORCE AS THEY MORE ADEQUATELY ADDRESS THE NEEDS OF EMPLOYEES IN TRAVEL CONTROL THAN DOES YOUR NEW PROPOSAL.
>
> "IF THIS IS UNACCEPTABLE TO YOU I SUGGEST THAT WE COMMENCE NEGOTIATIONS WITHIN FIVE DAYS AS PER ARTICLE 3(G). . ."

10. In a subsequent, undated correspondence, Respondent specificall stated its position with respect to each item contained in the three (3) prior agreements. It denoted which items Respondent agreed to retain, which it felt were not moot, and which it felt were non-negotiable as either managements rights under Section 7106(a) of the Statute or permissive subjects of bargaining under Section 7106(b)(1) of the Statute. The correspondence included new management proposals to replac the provisions contained in the prior agreements. It reads as follows:

> "Item One (1) from the Memorandum of Understanding transmitted by Nathan Cohen on May 10, 1980, remains unchanged and was item one (1) on the proposals of June 9, 1981.
>
> "Item Two (2) from the Memorandum of Understanding transmitted by Nathan Cohen on May 10, 1980, is moot. Under the one-step program, Travel Control officers are presented with an application before the file is necessarily completed and organized. Agreement on this item would make it virtually impossible to refer an applicant for interview in Travel Control when an "A" file on the alien is not readily available. Therefore, this interferes with Management's ability to assign work

and is non-negotiable pursuant to 5 USC 7106(a)(2)(B). Finally, this item conflicts with item two (2) of District Director Dogin's memorandum of November 5, 1980, agreed to by you in item one (1) of the November 24, 1980, Memorandum of Understanding, and which is now item eight (8) of the proposals submitted on June 9, 1981.

"Item three (3) of the May 10, 1980, Memorandum of Understanding was incorporated into the June 9th proposals as item six (6).

"Item four (4) of the May 10, 1980, Memorandum of Understanding has been deleted altogether and, in my view, is moot. This item was agreed to when cases were being calendared on the basis of 1000/month. Cases are no longer being calendared at this rate and by fall, it is anticipated that the calendar will be done away with altogether. In the meantime, Travel Control officers will be expected to process walk-in applicants under the one-step program. As such, the Service will not know from one day to the next how many applicants will appear for interviews and cannot schedule interviews in advance. In any event, this item interferes with Management's right to assign work.

"Item five (5) of the May 10, 1980 Memorandum of Understanding is essentially the same as Item three (3) of the June 9, 1981 proposals. In the fall, all reference to calendars will be deleted as moot.

"Item six (6), the first sentence of the May 10, 1980 Memorandum of Understanding has proven to limit Management in assigning sufficient Travel Control personnel to do the work of that unit. This item, therefore, is non-negotiable pursuant to 5 USC 7106(a)(1), 2(A) and 5 USC 7106(b)(1). In order that Management's rights not be restricted is this regard, item two (2) of the June 9, 1981 proposals is intended to replace this item to gain the desired flexibility for Management. I have reconsidered my position with respect to the second and third sentences of item six (6) of the May 10, 1980 Memorandum of Understanding and agree with your position that they are still applicable. Therefore, item two (2) of the proposals of June 9, 1981, is amended as follows:

> "'All officers assigned to the Travel Control Section of the New York District office will be expected to participate in

> the processing of combined applications. To the extent possible, designation of officers will be made on the effected morning and the chosen officer(s) assigned for the duration of the day. Consistent with the needs of the Service, rotation of officers to adjudicate combined applications will be equitable.'

"I have reconsidered my position with respect to item seven (7) of the May 10, 1980 Memorandum of Understanding and agree with you that it still has application to the New York District Travel Control Section. Therefore, item seven (7) of the May 10 Memorandum of Understanding will be incorporated into my June 9, 1981 proposals.

"I have also reconsidered my position with respect to item eight (8) of the May 10, 1980 Memorandum of Understanding and agree wiith (sic) you that it still has application. Therefore, it will be incorporated into the June 9, 1981, proposals.

"The first and second sentences of item nine (9) of the May 10, 1981 (sic) Memorandum of Understanding have been accomplished and are, therefore, moot. The specific training proposals which were agreed to by the parties will be addressed later in this letter. The third sentence of item nine (9) restricts Management's ability to assign work and personnel and limits Management's ability to determine the number of employees assigned to a particular unit. Therefore, this sentence is non-negotiable pursuant to 5 USC 7106(a)(2)(A) & (B) as well as 5 USC 7106(b)(1). In addition, I have reconsidered my position with respect to the last sentence of item nine (9) and agree with you that it still has application. I will, therefore, incorporate it into the June 9, 1981 proposals.

"Item ten (10) of the May 10, 1980, Memorandum of Understanding limits Management's ability to determine which personnel will do which types of work. . . .

"With respect to the lasts two (2) paragraphs of the May 10, 1980 Memorandum of Understanding, the agency's position with respect to unit structure was sustained by the Federal Labor Relations Authority, and, the last paragraph was included in the June 9, 1981 proposals as item ten (10).

"Items one (1) and two (2) of District Director Dogin's memorandum of November 5, 1980, were incorporated into the June 9, 1981 proposals as items seven (7) and eight (8).

"Item three (3) of Dogin's memorandum of November 5, 1980 was incorporated as item nine (9) of the June 9, 1981 proposals with the exception of the date because, to date, the required secure area has not yet been provided on the tenth floor.

"Item four (4) of District Director Dogin's memorandum of November 5, 1980, has been accomplished and is, therefore, moot.

"Item five (5) of District Director Dogin's memorandum of November 5, 1980, is essentially the same as item four (4) of the May 10, 1980 Memorandum of Understanding and would interfere with Management's ability to assign work and direct personnel. This item is, therefore, non-negotiable pursuant to 5 USC 7106(a)(2)(A) & (B).

"Item six (6) of Mr. Dogin's November 5, 1980 memorandum limits Management's discretion with respect to directing employees, assigning work, and determining the number of employees assigned to a work unit. This item is, therefore, not negotiable pursuant to 5 USC 7106(a)(2)(A) & (B) as well as 5 USC 7106(b)(1).

"Item seven (7) of Mr. Dogin's November 5, 1980 memorandum was incorporated into the June 9, 1981 proposals as item three (3).

"Item one (1)(a) of the one-step agreement carrying a typed date of November 24, 1980, was included as item nine (9) of the June 9, 1981 proposals. Where a secure area will be provided, whether it be composed of bullet-proof glass and include a silent alarm to the Federal Protective Service, is concerned with the budget of the Agency and its internal security practices. Such determinations are to be made by Management and are, therefore, non-negotiable pursuant to 5 USC 7106(a)(1).

"Item one (1)(b) of the November 24, 1980 agreement was incorporated into the June 9, 1981 proposals as items five (5) slightly changed. First-line supervisors must certify in writing to the Regional Personnel Office, any new duties to be included in position descriptions. The District Director cannot initiate a request for inclusion of the new duties in position descriptions without the written certification by first-line supervision. In addition, once the supervisory certification has been initiated, they will be forwarded through channels to the Regional Classification Section.

"Item one (1)(c) of the November 24, 1980 agreement conflicts with . . . the national agreement.

"Item one (1)(d) of the November 24, 1980 agreement, restricts Management's ability to assign work and to direct personnel. This item is, therefore, non-negotiable pursuant to 5 USC 7106(a)(2)(A) & (B).

"Item one (1)(e) has been accomplished and is, therefore, moot.

"I have reconsidered my position with respect to item one (1)(f) and item one (1)(g) of the November 24, 1980 agreement and with additional clarification, agree that they still have application. Therefore, the following will be incorporated into the June 9, 1981 proposals.

> "'In the event fraud is suspected, an Immigration Examiner may, with the approval of Travel Control Supervisor, limit combined processing applications to an immediate 245 interview and, consistent with II Handbook guidelines and related criteria, refer the I-130 or I-140 portion of the application with the file to the I-130 or I-140 Unit for further processing and the scheduling of an interview for determination of fraud.
>
> "'Consistent with the availability of Investigators, an Immigration Examiner may, with the approval of a Travel Control Supervisor, transfer a file to Investigations for a marriage fraud or employment fraud investigation. The 245 portion of the interview is to be completed but no formal I-130 or I-140 interview need be conducted. Such referrals shall be consistent with II Handbook guidelines and related criteria.'

"With respect to item one (1)(h), each provision of the training agreement will be addressed separately later in this letter. However, the statement that 'a 10-hour course in 245 examinations shall suffice to permit assignment of non-245 Examiners on a standby basis for "one-step" examinations' restricts Management's ability to assign personnel and work and is, therefore, non-negotiable pursuant to 5 USC 7106(2)(A) & (B).

"Item one (1)(i) of the November 24, 1980 agreement has been incorporated into the June 9, 1981 at item two (2).

"Item one (1)(j) is moot. However, I agree that the following language would still apply:

> "'This Memorandum of Understanding is not intended to abolish, solely because of exclusion here from, any practices which have been mutually acceptable in the New York District Travel Control Section.'

"Item one (1)(k) of the November 24, 1980 agreement interferes with Management's right to determine the internal security practices of the agency as well as Management's ability to assign personnel to do certain types of work and is, therefore, non-negotiable pursuant to 5 USC 7106(a)(1) and 5 USC 7106(a)(2)(A) & (B). . . .

"Proposal one (1) of the Training Agreement conflicts with Management's position (which has been upheld by the Federal Labor Relations Authority) with respect to unit structure. All Immigration Examiners are expected to do the full range of duties of the Immigration Examiner position. An Immigration Examiner is not assigned to a unit, but rather Management assigns a certain type of work from within the position description, to the Immigration Examiner. The duties within the position description may be called I-140, I-130 or 245 work, but the employee is an Immigration Examiner, not an I-140 Examiner or an I-130 Examiner. This proposal is, therefore, non-negotiable pursuant to 5 USC 7106(a)(1) & (2)(A) & (B).

"Proposal two (2) of the training agreement is non-negotiable for the same reasons as stated above. It restricts Management's ability to determine the organization of the agency, and interferes with Management's ability to assign work and personnel.

"The first sentence of proposal three (3) and the first sentence of proposal four (4) of the training agreement will be incorporated into the June 9, 1981 proposals by adding the following to item four (4):

> "'Cross training will be an ongoing effort. Training will be equitably distributed and based on need.'

"The remaining sentences of proposals three (3) and four (4) of the training agreement are non-negotiable as they restrict Management's ability to determine what training will be given and to whom (assignment of work and personnel), as well as the type of work an employee is assigned while in a "training program". Proposal five (5) purports to establish training positions and is determinative of the type of work the training positions will be assigned. Therefore, these matters are all non-negotiable pursuant to 5 USC 7106(a)(2)(A) & (B) and 5 USC 7106(b)(1).

"Proposal number six (6) interferes with Management's right to assign work and personnel and is non-negotiable pursuant to 5 USC 7106(a)(2)(A) & (B).

"I have reconsidered my position with respect to proposals seven (7), proposal ten (10) (which follows proposal seven (7)), proposal nine (9) and proposal ten (10), and will incorporate them into the June 9, 1981, proposals as follows:

> "'To the extent possible, Immigration Examiners will be furnished a complete and current set of the laws, regulations and O. I's, as well as all transmittal memoranda changing the laws, regulations, O. I's and the Handbook.
>
> "'To the extent possible, every unit will maintain a current and complete set of BIA decisions, and will maintain subject folders containing BIA decisions, and will maintain subject folders containing BIA decisions and unit decisions on that subject.
>
> "'The New York District Office will encourage training. . . . If an employee wishes to enroll in an outside training program, Management will consider a request for a change in shift, if necessary, and if consistent with the needs of the unit. To the extent possible, the New York District will

afford Immigration Examiners the opportunity to attend the Journeyman Examiner Course.'

" . The Service and the Union agree that the terms of this agreement and the changes in procedure addressed herein are not to be construed as encouraging adjudicating officers to approve questionable cases or to short cut fraud investigations. The Service and the Union agree that it is essential to maintain the quality of adjudications and will preserve the current level of discretion vested in Immigration Examiners.

"2. All officers assigned to the Travel Control Section of the New York District Office will be expected to participate in the processing of combined applications on an as needed basis. To the extent possible, designation of officers will be made on the effected morning and the chosen officer(s) assigned for the duration of the day. Consistent with the needs of the Service, rotation of officers to adjudicate combined applications will be equitable.

"3. Except in unforeseen circumstances, the Service and the Union agree that no officer not belonging to or specifically assigned that day to Section 245 will be removed from his normal range of duties to perform Section 245 work.

"4. The Service and the Union agree that an officer adjudicating Section 245 cases may in his discretion swear in an applicant and have him attest to the validity of his statements, instead of reviewing each and every item on the I-485 application.

"5. In the event fraud is suspected, Immigration Examiners may, with the approval of Travel Control Supervisor, limit combined processing applications to an immediate 245 interview and consistent with II Handbook guidelines and related criteria, refer the I-130 or I-140 portion of the application with the file to the I-130 or I-140 Unit for further processing and the scheduling of an interview for determination of fraud.

"6. Consistent with the availabilility of Investigators, an Immigration Examiner may, with the approval of a Travel Control Supervisor, transfer a file to Investigations for a marriage fraud or employment fraud investigation. The 245 portion of the interview is to be completed but no formal I-130 or I-140 interview need be conducted. Such referrals shall be consistent with II Handbook guidelines and related criteria.

"7. Cases will be calendared and/or interviews conducted on the basis of a four day week (Monday through Thursday). Friday will be a non-interview day enabling officers to work on back logs and pending cases.

"8. Premature status report requests (prior to published processing periods) from outside the federal government need only be filed.

"9. Every effort will be made to insure the Travel Control officers who have no experience in adjudicating combined applications be trained in the proper procedures relative to combined processing. Where cross-training will be an on-going effort, it is understood that Immigration Examiners with experience in certain travel control duties shall be considered cross-trained in these types of duties. Training will be equitably distributed and based on need.

"10. To the extent possible Immigration Examiners will be furnished a complete and current set of the laws, regulations and O.I.'s as well as all transmittal memoranda changing the laws, regulations, O.I.'s and the Handbook.

"11. To the extent possible every unit will maintain a current and complete set of BIA decisions, and will maintain subject folders containing BIA decisions and court decisions on that subject.

"12. The New York District Office will encourage training by exercising diligence informing employees to the extent possible of all available training programs, training material including language tapes), and tuition assistance programs. If an employee wishes to enroll in an outside training program, management will consider a request for a change in shift, if necessary, and if consistent with the needs of the unit.

"13. To the extent possible, the New York District will afford Immigration Examiners the opportunity to attend the Journeyman Examiner Course.

"14. New duties assigned to applications clerks as a consequence of one-step should be listed by Travel Control supervisors and forwarded to the Regional Office for review by classification.

"15. A one-step, walk-in applicant will be directed from the Information Unit on the first floor to Room 10-104 of Travel Control. An application clerk will review the application for completeness. If not complete, the applicant will be informed of deficiencies and told to return with all documentation. If complete, the application will be receipted and placed in chronological order.

"16. An immediate search of MIRAC will be made to ascertain the existence of an 'A' file. If none exists, a file will be created through a block of 'A' numbers issued to Travel Control by RAIS. If a file exists, a check will be made of the file shelf for file location. If the file is in the file room, it will immediately be charged to Travel Control. If in an operating unit, a search for the file will commence immediately by the designated 'One-step' file clerk. If the file is in another Service office, a request for the file transfer will be made via MIRAC. The interview will proceed through the creation of a work folder. If the file is in the Federal Records center, the interview will proceed through the creation of a work folder. In all cases where the file is not readily available (FRC, other Service office, etc) a MIRAC print out with pertinent biographical data will be included in the work folder.

"17. Applicants will be referred to the third floor for acceptance of fees until a secure area for acceptance of fees is provided on the tenth floor.

"18. The Menorandum (sic) of Understanding is not intended to abolish, solely because of exclusion here from, any practics (sic) which have been mutually acceptable in the New York District Travel Control Section."

11. By letter dated July 1, 1981 the Charging Party replied to the above undated correspondence specifically responding to each of the 19

items proposed by Respondent in the correspondence noted above. It accepted certain of the proposals which were left unchanged from the previous agreements; but stated that it (sic) either did not agree, or wished further negotiations, over others. Charging Party also invoked its right, under Article 3, section G of the parties' contract, to negotiate over the proposed changes. The Charging Party's letter stated:

> "This 8-page missive was literally more than we requested. While we appreciate your reconsideration of immediate unilateral recission of past agreements (not a good idea) as stated by the departed Acting District Director in his letter of June 9, the information provided in this letter is premature and irrelevant to the issue at hand. We did not request Ms. Dec to provide us with her opinions as to the negotiability of each issue at this time. She and her colleagues as management's chief negotiators at prior negotiations permitted bargaining on the subjects listed and gave their approval to implementation of the proposed items. While they may be declared non-negotiable at the bargaining table, they may not be declared non-negotiable prior to renewed bargaining. It is the published intent of the Congress of the United States while debating approval of the Civil Service Reform Act of 1978 that all items, even those management feels should be non-negotiable, must be discussed at the bargaining table and a good faith effort made to resolve the items in a negotiable context. Declaration of our proposals as non-negotiable prior to commencement of negotiations would be a clear Unfair Labor Practice, a unilateral change in working conditions not bargained in good faith.
>
> "In order to assist your preparation for bargaining I would like to review your proposals and make suggestions for changing them and for including new proposals.
>
> "Your proposal 1 is an unchanged version of Item 1 of the May 10 Agreement and is acceptable
>
> "Your proposal 2 is not acceptable. We propose substituting Item 6 of the May 10 Agreement and Item 1 (I) of the November 24 Agreement.
>
> "Your proposal 3 is an unchanged version of Item 7 of the May 10 Agreement and is acceptable.
>
> "Your proposal 4 is an unchanged version of Item 8 of the May 10 Agreement and is acceptable.

"Your proposal 5 is an unchanged version of Item 1(f) of the November 24 Agreement and is acceptable.

"Your proposal 6 is an unchanged version of Item 1(g) of the November 24 Agreement and is acceptable.

"Your proposal 7 is a modified version of Item 5 of the May 10 Agreement and is acceptable.

"Your proposal 8 is an unchanged version of Item 3 of the May 10 Agreement and is acceptable.

"Your proposal 9 is not acceptable. We propose substituting Proposals Two through Six of the District Training Agreement and Item 9 of the May 10 Agreement.

"Your proposal 10 is an unchanged version of Item 7 of the District Training Agreement and is acceptable.

"Your proposal 11 is not acceptable. We propose substituting Proposal 8 of the District Training Agreement.

"Your proposal 12 is an unchanged version of Proposal Nine of the District Training Agreement and is acceptable.

"Your proposal 13 is a modified version of Proposal Ten of the District Training Agreement and is acceptable.

"Your proposal 14 is a modified version of Item 1(b) of the November 24 Agreement and is acceptable.

"Your proposals (sic) 15 appears to be acceptable but we would want to discuss procedures for increasing efficiency at the table and will not sign off at present.

"Your proposal 16 falls into the same category proposal 15.

"Your proposal 17 is acceptable with inclusion of Item 1(a) of the November 24 Agreement.

"Your proposal 18 is acceptable.

"Your proposal 19 is acceptable.

"While proposal 2 of the May 10 Agreement may be too confining form large-scale 1-stop operations, it is certainly not "moot" and we are interested in your proposals to change this section.

> "Proposal 4 of the May 10 Agreement concerns the conduct of interviews, a practice continuing with the institution of 1-step adjudications. As the practice is not "moot" we propose the continuation of this item.
>
> "Item 10 of the May 10 Agreement will be moot upon compliance with Article 9 of the May 10 Agreement.
>
> "Item 1(c) of the Agreement continues to be valid and does not conflict with the National Agreement as it still places the burden for seeking a Desk Audit on the individual employee. The District may at to expedite that request only after an individual employee submits it.
>
> "Item 1(d) is redundant and may be deleted as its provisions are covered in the May 10 Agreement.
>
> "Item 1(h) was agreed to in order to expedite 245 training at the behest of management. If management does not want this assistance it is withdrawn and may be considered subject entirely to provisions of the Training Agreement which is still included in our proposals (see above).
>
> "Item 1(k) is satisfied pursuant to your stipulation that a Contract Guard has been hired and will be employed for crowd control and security purposes on the tenth floor.
>
> "Proposal One of the Training Agreement concerns definition for the purposes of training and is not used for the vague malignant purposes you allege. We propose continuation of the definition.
>
> "Considering your failure to provide agreeable solutions to all of the issues involved, we invoke our right under contract Article 3(g) to commence negotiations within five workdays, or a reasonable time thereafter, on your proposed change in working conditions."

12. The parties agreed to commence negotiations on July 29, 1981. On that date the parties met and Charging Party submitted proposals for ground rules to cover the negotiations. The parties agreed to all items except items 12 and 13 of the Charging Party's proposals on which an impasse was reached. Said proposals stated as follows:

> "12. The parties recognize that no change in practices and procedures will be implemented until conclusion of an Agreement.

> "13. No provisions of this Agreement will go into effect prior to completion of negotiations."

Although the parties met with a mediator from the Federal Mediation and Conciliation Service on July 30, the ground rules impasse could not be resolved.

13. By letter dated August 5, 1981, Respondent, by James Jasey, Acting District Director, notified the Charging Party that the changes in Travel Control Branch procedures would be implemented on August 17, 1981. It stated that the Union's proposed ground rules would indefinitely limit management's ability to take actions protected by Section 7106 of the Statute and were, therefore, non-negotiable. The letter again reviewed, item by item, the provisions of the three prior agreements and denoted which provisions were being retained at which were modified and which were not being retained. The correspondence included the procedures which would be implemented on August 17 and invited impact and implementation proposals prior to that date. The Charging Party did not submit impact and implementation proposals. The letter stated:

> "Reference is made to the District Director's letter of June 9, 1981, advising you of the District's intent to change Travel Control procedures as addressed in (1) the Memorandum of Understanding transmitted to the parties by Nathan Cohen on May 10, 1980, (2) District Director Dogin's memorandum of November 5, 1980, (3) the Memorandum of Understanding, and (4) the Travel Control Branch Training Agreement. You responded to the proposed changes by letter dated June 17, 1981, requesting additional information with respect to the changes as well as negotiations on the proposed changes. Thereafter, you were provided (in writing), Management's full position on all of the items contained in the above referenced documents, including but not limited to the Agency's position with respect to negotiability. In addition, you were provided nineteen (19) new proposals for consideration. By letter dated July 1, 1981, you responded to the agency's nineteen (19) new proposals. Because your letter of July 1, 1981, contained some matter dealing with the impact and implementation of Management's proposals, a date for negotiations was scheduled for July 29, 1981. On July 29, 1981, you presented Management with a set of proposed ground rules. The ground rules were acceptable with the exception of the following two items:
>
> > "'The parties recognize that no change in practices and procedures will be implemented until conclusion of an Agreement.

> "'No provision of this Agreement will go into effect prior to completion of negotiations.'

"Your stated position with respect to these items was that Management would be precluded from implementing items which it considered to be an exercise of a reserved Management right until a third party rendered a decision sustaining the Agency's non-negotiability determination. We were unable to resolve our differences before a Federal Mediator. Therefore, this is to advise you that it is the Agency's position that the above cited Union proposals for ground rules would indefinitely limit Management's ability to take action protected by 5 USC 7106. Hence, your proposals would restrict the exercise of rights reserved to Management by law and as such, the proposals are non-negotiable pursuant to 5 USC 7106.

"In addition, this is to advise you that implementation of all items agreed to by the Union as well as those items which are not negotiable will be implemented August 17, 1981. Specifically, our position on each item is as follows:

"Memorandum of Understanding transmitted by Nathan Cohen on May 10, 1980.

"Item one (1) was agreed to by the Union and is included as Item (1) of the attached document.

"Item two (2) interferes with Management's ability to assign work. In addition, this item purports to determine whether files will be used, how they will be used and is determinative of the methods and means of performing work. This item is, therefore, non-negotiable pursuant to 5 USC 7106(a)(2)(3), and 5 USC 7106(b)(1).

"Item three (3) was agreed to by the Union and is included as item two (2) of the attached document.

"Item four (4), the first sentence, restricts Management's ability to assign work and personnel and is non-negotiable pursuant to 5 USC 7106(a)(2)(3). The second sentence is included as item three (3) of the attached document.

"Item five (5) was agreed to by the Union and is included as item four (4) of the attached document.

"Item six (6), the first two (2) sentences, limit Management's ability to assign work and personnel, and are not negotiable pursuant to 5 USC 7106(a)(2)(A) & (B). The third sentence requires Management to rotate all Examiners and eliminates Management discretion to determine which employees will do certain duties. It is, therefore, non-negotiable pursuant to 5 USC 7106(a)(2)(A) & (B).

"Item seven (7) places a condition on the exercise of Management's reserved right to assign work and personnel and would personnel and would eliminate Management's ability to assign work under certain circumstances and is, therefore, non-negotiable pursuant to 5 USC 7106 (a)(2)(A) & (B) ability to assign work under certain circumstances and is, therefore, non-negotiable pursuant to 5 USC 7106(a)(2)(A) & (B).

"Item eight (8) was accepted by the Union and is included as item five (5) on the attached document.

"With respect to item nine (9), a training agreement was negotiated and its provisions will be addressed herein. However, the requirement that all Immigration Examiners complete a cross-training program interferes with Management's reserved right to assign work and personnel and is, therefore, non-negotiable pursuant to 5 USC 7106 (a)(2)(A) & (B). The third sentence restricts Management's ability to assign work and personnel and limit Management's ability to assign work and personnel and limit Management's ability to determine the number of employees assigned to a particular unit, and is non-negotiable pursuant to 5 USC 7106(a)(2)(A) & (B) as well as 5 USC 7106(b)(1). The last sentence is included as item six (6) of the attached document.

"Item ten (10) of the May 10, 1980, Memorandum of Understanding limits Management's ability to determine which personnel will do which types of work and interferes with Management's right to assign work and to direct employees. It is, therefore, non-negotiable pursuant to 5 USC 7106(a)(2)(A) & (B).

"The last paragraph was agreed to by the Union and is included as the last item of the attached document.

"District Director Dogin's memorandum of November 5, 1980.

"With respect to items one (1) and two (2), no change was proposed by Management. Therefore, there is no obligation to negotiate. These items are, therefore, included on the attached document as item seven (7).

"Item three (3) is determinative of Management's reserved right to assign work and personnel and is non-negotiable pursuant to 5 USC 7106(a)(2)(A) & (B). In addition, matters dealing with the security of the tenth floor cash receipt booth (sic) deal with the internal security practices of the Agency as well as the methods and means of performing work and are, therefore, non-negotiable pursuant to 5 USC 7106(a)(1) and 5 USC 7106(b)(1).

"Item four (4) has been accomplished. However, determination with respect to the assignment of training duties deal with the assignment of work and personnel and is a matter not subject to negotiations pursuant to 5 USC 7106(a)(2)(A) & (B).

"Item five (5) places severe limitations on Management's ability to assign work and to direct employees. This item is non-negotiable pursuant to 5 USC 7106(a)(2)(A) & (B).

"Item six (6) limits Management's discretion with respect to directing employees, assigning work, and determining the number of employees assigned to a work unit. As such, this item is non-negotiable pursuant to 5 USC 7106(a)(2)(A) & (B) as well as 5 USC 7106(b)(1).

"Item seven (7) has been included as item four (4) of the attached document.

"One-step Agreement dated November 24, 1981

"Item 1(a) restricts Management's ability to assign work and direct personnel and is no-negotiable (sic) pursuant to 5 USC 7106(a)(2)(A) & (B). In addition, it deals with the internal security practices of the agency and is non-negotiable pursuant to 5 USC 7106(a)(1).

"Item 1(b) is included as item eight (8) of the attached document.

"Item 1(c) is included as item nine (9) of the attached document.

"Item 1(d) places a limit of two (2) on the number of employees the District Director may place on stand-by duty. Therefore, this item interferes with Management's right to assign work, director employees and is determinative of the number of employees assigned. . . .

"Item 1(e) has been accomplished.

"Items 1(f) and 1(g) were accepted by the Union and are included as items ten (10) and eleven (11) of the attached document.

"Item 1(h) restricts Management's ability to direct employees and to assign work and is non-negotiable pursuant to 5 USC 7106(a)(2)(A) & (B).

"The first part of item 1(i) is included on the attached document as item twelve (12). The second part requires Management to assign all officers to 245 Standby duty which eliminates Management's discretion to determine which personnel will do certain duties and is, therefore, non-negotiable pursuant to 5 USC 7106(a)(2)(A) & (B).

"Item 1(j) was amended by Management and accepted by the Union by letter dated July 1, 1981. The agreed upon item is included on the attached document as item sixteen (16).

"Item 1(k) interferes with Management's right to determine the internal security practices of the agency as well as Management's ability to assign personnel to do certain types of work and is, therefore, non-negotiable pursuant to 5 USC 7106(a)(1) and 5 USC 7106(a)(2)(A) & (B).

"Training Agreement, Travel Control Branch, New York District

"Proposal 1 is determinative of the organization of the Agency and is non-negotiable pursuant to 5 USC 7106(a)(1).

"Proposal 2 is also determinative of the organization of the Agency and would require Management to assign certain training duties at specified times in violation of Management's right to assign work and direct employees. This proposal is, therefore, non-negotiable pursuant to 5 USC 7106(a)(1), and 5 USC 7106(a)(2)(A) & (B).

"Proposal 3 conflicts with Management's right to assign work by requiring that there be a cross-training program. In addition, the second two (2) sentences of the proposal place limitations on Management's discretion to direct employees and assign work and employees unless certain conditions are met with respect to training in violation of 5 USC 7106(a)(2)(A) & (B). For these reasons, this proposal is non-negotiable.

"Proposal four (4) places a condition on which employees will be assigned training duties as it would require all Examiners to be rotated if there exists a need to rotate them or not. In addition, this proposal eliminates Management's discretion to determine that there will or will not be a cross-training program and requires that Management development a training schedule for presentation to the Union in violation of Management's right to assign work. This proposal is non-negotiable pursuant to 5 USC 7106(a)(2)(B).

"Proposal five (5) negates Management's discretion with response to determining the organization of the Agency in that it purports to establish a training position as well as the type of work assigned to a position. This proposal is, therefore, non-negotiable pursuant to 5 USC 7106(a)(1) and 5 USC 7106(a)(2)(A). Proposal six (6) interferes with Management's ability to assign work and personnel and is, therefore, non-negotiable pursuant to 5 USC 7106(a)(2)(A) & (B).

"Proposal seven (7) was accepted by the Union as written in proposal ten (10) of Acting District Director Foster's letter which you responded to on July 1, 1981, and is included as item thirteen (13) of the attached document.

"Proposal eight (8) would require the Agency to furnish certain tools for the performance of work and interferes with Management's choice of the means of performing work and is, therefore, excepted from Management's obligation to bargain pursuant to 5 USC 7106(b)(1).

"The Agency's proposal to change proposal nine (9) was accepted by the Union by letter dated July 1, 1981, and is included as item fourteen (14) on the attached document.

"The Agency's proposal to change proposal ten (10) was accepted by the Union by letter dated July 1, 1981, and is included as item fifteen (15) on the attached document.

"In the event you would like to present any impact or implementation matter for my consideration, please do so prior to the August 17, 1981 implementation date.

"1. The Service and the Union agree that the terms of this Agreement and the changes in procedure addressed herein are not to be construed as encouraging adjudicating officers to approve questionable cases or to short cut fraud investigations. The Service and the Union agree that it is essential to maintain the quality of adjudications in this office and will preserve the current level of discretion vested in Immigration.

"2. Premature status report requests (prior to published processing periods) from outside the Federal Government need only be filed.

"3. Family groups represent one interview.

"4. Cases will be calendared for interviews conducted on the basis of a four day week (Monday through Friday). One day will be a non-interview day enabling officers to work on backlog and pending cases.

"5. The Service and the Union agree that an officer adjudicating Section 245 cases may in his discretion, swear in an applicant and have him attest to the validity of his statements, instead of reviewing each and every item on the I-485 application.

"6. It is understood that Immigration Examiners with experience in other Travel Control Sections shall be considered cross-trained in those sections.

"7. A one-step applicant will be directed from the Information Unit (first floor) to room 10-104 of Travel Control. An application clerk (trained by Contact Representatives) will review the application for completeness. If not complete, the applicant will be informed of deficiencies and told to return with all documentation. If complete, the application will be receipted and placed in chronological order. An immediate search of MIRAC will be made to ascertain the existence of an "A" file. If none exists a file will be created through a block of "A" numbers issued to Travel Control by RAIS. If a file exists, a check will be made of the file shelf for file location. If the file is in the file room, it will immediately be charged to Travel Control. If in an operating unit, a search for the file will commence immediately by the designated "One-Step" file clerk. If the file is in another Service office, a request for the file transfer will be made via MIRAC. If the file is in the Federal Records Center, the interview will proceed through the creation of a work folder. In all cases where the file is not readily available (FRC, other Service office, etc) a MIRAC print out with pertinent biographical data will be included in the work folder.

"8. The District will initiate a request for inclusion of newly assigned duties and functions in the position descriptions of Application Clerks.

"9. The District will attempt to expedite desk audits requested by Service personnel who feel that their positions should be upgraded due to newly assigned duties and functions related to "One-Step".

"10. In the event fraud is suspected, Immigration Examiners only, with the approval of Travel Control Supervisor, limit the combined processing of an application to an immediate 245 interview and consistent with II Handbook guidelines and related criteria, refer the I-130 or I-140 portion of the application with the file to the I-130 or I-140 Unit for further processing and the scheduling of an interview for determination of fraud.

"11. Consistent with the availability of Investigators, an Immigration Examiner may, with the approval of a Travel Control Supervisor, transfer a file to Investigations for a marriage fraud or employment fraud investigation. The 245 portion of the interview is to be completed but no formal I-130 or I-140 interview need be conducted. Such referrals shall be consistent with II Handbook guidelines and related criteria.

"12. Assignments to 245 Examinations are to be equitable.

"13. To the extent possible Immigration Examiners will be furnished a complete and current set of the laws, regulations, and O.I.'s as well as all transmittal memoranda changing the laws, regualtions, (sic) O.I.'s and the Handbook.

"14. The New York District Office will encourage training by exercising diligence in informing employees to the extent possible of all available training programs, training material including language tapes, and tuition assistance programs. If an employee wishes to enroll in an outside training

> program, Management will consider a request for a change in shift, if necessary, and if consistent with the needs of the Unit.
>
> "15. To the extent possible, the New York District will afford Immigration Examiners the opportunity to attend the Journeyman Examiners Course.
>
> "16. Except as otherwise provided in this letter, there is no intent to abolish, solely because of exclusion (sic) here from, any practices which have been mutually acceptable in the New York District Travel Control Section.
>
> "17. It is understood by the parties that these provisions may be modified by Management in accordance with Article 3, Section G of the National Agreement."

On or about August 17, 1981 the three prior agreements were replaced by the procedures contained in the August 5 correspondence. On August 26, 1981, the Charging Party formally requested Federal Service Impasses Panel (herein called FSIP) assistance with respect to the impasse over ground rules. The FSIP subsequently declined jurisdiction over the August 26 request for assistance. This denial was based on the fact that there was a threshhold question concerning the Employer's obligation to bargain over the union's ground rules proposals which had to be resolved before the Panel would assert jurisdiction.

14. Among the provisions of the May 10, 1980 Memorandum of Understanding (paragraph 4) referred to above was the following: "The Service and the Union agree that the interviewing of Section 245 applicants shall be based on an average of 10 interviews per officer per day. Family groups represent one interview." This was one of the items declared nonnegotiable. The procedures implemented on August 17, 1981 were silent with respect to any fixed number of interviews an officer would be expected to take per day.

15. Among the provisions of the November 24, 1980 Negotiated Agreement on "One-Step" Examinations referred to above in paragraph 20 was the following: (paragraph 1(a)) "A Cash Clerk will not be stationed on the Tenth Floor prior to completion of a bullet proof booth with silent alarm extension to the Federal Protective Service." This is another of the items which was declared nonnegotiable. The procedures implemented on August 17, 1981 were silent with respect to this issue.

16. On or about October 5, 1981, Respondent served the Charging Party with a copy of an October 2 intra-management memorandum. The Union responded to this memorandum on October 5, 1981. Management responded on October 8 and 21. The Union responded to these letters on October 14 and October 21, respectively.

In addition to the stipulation the parties introduced testimony at the hearing. That testimony indicates that the procedures implemented on August 17, 1981 were silent with respect to any fixed number of interviews an officer would be expected to take per day. This figure had not been formally increased until the October memorandum. Several employees established through their testimony that effective November 2 management increased the number of required interviews from 10 interviews to 15. The impact of change was increased pressure on employees to work harder and faster, resulting in stress and a lowering of morale and the need for some employees to often work beyond their normal duty hours in order to keep with their new daily case requirements. Employees are also unable to work off their backlogs and sometimes are criticized on evaluations in this respect.

With regard to the assignment of a cashier to the tenth floor, one of the provisions of the November 24, 1980 negotiated agreement between the Respondent and the Union was the following provision: "A Cash Clerk will not be stationed on the Tenth Floor prior to the completion of a bullet proof booth with silent alarm extension to the Federal Protective Service." This provision was one of the items declared to be non-negotiable by Respondent when it terminated the three negotiated agreements in August of 1981. The new procedures Respondent implemented on August 17 were silent with respect to this issue. The evidence introduced at the hearing established that while a booth with bullet proof glass was set up for the cash clerk, on the tenth floor, no silent alarm was ever installed. No notification was given to the Union of management's intention to assign cash clerks to the tenth floor until the October memorandum. The need for a silent alarm and employee concerns with regard to having to perform this duty is indicated by the fact that Respondent's cash clerks in other locations within the same building have been the victims of at least two armed robberies.

The parties urged that the issues presented herein are as follows:

> "A) Did Respondent violate Section 7116(a)(1) and (5) of the Statute when, on August 17, 1981, it implemented at Travel Control Branch procedures, which did not contain some of the provisions contained in the three previously negotiated agreements?
>
> "B) Did Respondent violate Section 7116(a)(1) and (5) of the Statute when, it began assigning unit employees to work as cashiers on the Tenth Floor without installing a silent alarm system?
>
> "C) Did Respondent violate Section 7116(a)(1) and (5) of the Statute when, on or about October 2, 1981, it effectively implemented an increase in the number of case interviews unit employees were required to conduct each

work day without affording the Charging Party an opportunity to negotiate concerning the impact and implementation of the change?"

Conclusions

(a) 2-CA-1151

Respondent suggests that this matter is one for invocation of the parties negotiated grievance procedure. The General Counsel presented a prima facie case of abrogation of three (3) memoranda agreed to by the parties, but ignores the above argument. Such previously agreed to memoranda, even under general law, are an extension of the contract. Further, "a collective bargaining agreement is not an ordinary contract. '. . . [I]t is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. . . . The collective agreement covers the whole employment relationship. It calls into being a new common law - the common law of a particular industry or of a particular plant.'" John Wiley and Sons v. Livingston, 376 U.S. 543, 550 (1964). In order to modify or change that agreement, good faith negotiations must occur under the Statute. Contrary to Respondent's proposition, this is not a case where the existence of the unfair labor practice turns on the interpretation of the parties collective bargaining agreement or whether or not that agreement had been breached, but rather, it is a case where the Authority must consider whether the Respondent's abrogation of the agreed upon memoranda, which had become part of its collective bargaining, constituted the violation of a statutory right.

In short, the real issue in this matter is whether Respondent gave the Union an opportunity to negotiate concerning its proposed action to terminate the three (3) memoranda which concerned conditions of employment in a unit of employees it represented.

Resolution of that issue does not require the Authority to interpret Article 3, Section G of the National Agreement. Nor does it require, as Respondent advocates, an analysis as to whether a patent or flagrant breach of the agreement exists. Moreover, it is not a case where the Authority would be divested of jurisdiction to decide the matter, even if a construction of Article 3, Section G was necessary to decide whether the Statute had been violated. Determination requires only a finding of whether Respondent gave notice of its proposed action to terminate the three (3) memoranda and an opportunity to negotiate. It did not.

A bare assertion that the resolution of this matter should be made through the grievance machinery of the parties unfortunately does not make it so. Such a contention requires examination of the clause in question. After such an examination, it is my belief that Respondent's efforts to invoke the negotiated grievance machinery is wholly untenable and must fall in view of the plain and unambiguous language of that Article. Inasmuch as the Article manifestly does not sanction the changing of previously agreed upon memoranda without good faith negotiations, it is found that Respondent's action in abrogating those agreements was a modification of the collective bargaining agreement between the parties which gave rise, not to an arbitrable matter of contract interpretation, but to an unfair labor practice. My conclusion, therefore, must be that Respondent violated section 7116(a)(1) and (5) when it abrogated or repudiated the three (3) memoranda, by substituting on August 5, 1981 one memoranda of its own without bargaining with the exclusive representative.

Respondent acknowledges confusion as to the General Counsel's position in this matter. Indeed there is difficulty with that analysis which relies, it appears almost exclusively, on establishing the negotiability of the matters terminated. A review of the proposals asserted by the General Counsel to be negotiable demonstrates that at least some of the proposals had been previously determined by the Authority to be negotiable prior to the hearing in this matter, while others were determined to be negotiable by the Authority after the Respondent submitted its position of nonnegotiability. In any event, case law now clearly enjoins that an assertion of nonnegotiability as the basis for revoking a previous agreement, and actions taken in repudiation of that agreement constitute a repudiation of the agreed upon matter or matters in violation of section 7116(a)(1) and (5) of the Statute, if the Authority has previously determined that essentially identical proposals are negotiable. See Department of Treasury, Internal Revenue Service, Memphis Service Center, 15 FLRA No. 159 (1984); see also Department of the Air Force, U.S. Air Force Academy, 6 FLRA 548 (1981), aff'd 717 F.2d 1314 (16th Cir. 1983). See also Veterans Administration, Veterans Administration Regional Office (Buffalo, New York), 10 FLRA 167 (1982); Great Lakes Program Service Center, Social Security Administration, Department of Health and Human Services, Chicago, Illinois, 9 FLRA 499 (1982), and cases cited therein. In such circumstances, I deem it unnecessary to decide whether a particular provision was or was not negotiable, but conclude that the General Counsel's showing that some matters contained in the three (3) memoranda which were declared by Respondent to be nonnegotiable had previously been determined by the Authority to be negotiable and is sufficient to meet its burden of proof requirements for establishing an abrogation or repudiation of existing agreements between the parties.

Implicit in the above finding is a rejection of Respondent's argument that the National Agreement is controlling herein.

(b) 2-CA-20037

Respondent admits that it "technically" changed the November 24, 1980 agreement involving whether or not it would provide bullet proof glass and a guard on the 10th floor for the cashier. Its defense is that the impact of such a change was insubstantial and, in essence, unworthy of consideration as a violation of the Statute by the Authority.

It also admits deleting certain provisions from the collective bargaining agreement concerning calendar procedures for scheduling interviews, but contends that this provision was inherent in its right to assign work under section 7106(a)(2)(A) and (B) of the Statute and thereby its right to determine the quantity of work to be performed by employees. Assuming it had an obligation to bargain, management asserts that the General Counsel failed to establish any adverse impact of this change.

With respect to the former issue of management rights, it is clear from the record that what is involved here are aspects of procedures by which Respondent would schedule interviews and not an infringement on its right to assign such work. In those circumstances section 7106(b)(2)[5] cannot be ignored. It is concluded that the Union had a statutory right to bargain over those procedures. Moreover, case law has clearly established that an opportunity to bargain concerning impact and implementation must be offered to the union even where management rights are involved. Internal Revenue Service, Jacksonville District, 3 FLRA 630 (1980); Internal Revenue Service, Washington, D.C., 4 FLRA 488 (1980).

Concerning the latter issue, it is plain from the record that cashiers handled large sums of money and several robberies had occurred, thereby, making employees apprehensive about their safety when working the tenth floor cashier without adequate security for their safety. Notwithstanding that Respondent sees little impact, I find that this change had more than an insubstantial impact on employees working conditions, thereby rejecting Respondent's argument that the matter is de minimus. It must, therefore, be concluded that the "technical" change without negotiations is violative of section 7116(a)(1) and (5) of the Statute.

Accordingly, it is concluded that Respondent violated section 7116(a)(1) and (5) of the Statute by unilaterally implementing changes in October 1981 concerning the tenth floor cashier and by implementing an increase in the number of case interviews unit employees were required to conduct each work day without affording the Union an opportunity to negotiate concerning the impact and implementation of the changes.

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[5] Section 7106(b)(2) reads as follows:

> (b) Nothing in this section shall preclude any agency and any labor organization from negotiating -
>
> "(2) procedures which management officials of the agency will observe in exercising any authority under this section; . . ."

The Remedy

Having found that Respondent did engage in conduct violative of section 7116(a)(1) and (5) of the Statute it is recommended that an Order issue requiring it to cease and desist therefrom and take certain affirmative actions designed to effectuate the policies of the Statute.

The General Counsel requests that Respondent be required to reinstitute the negotiated agreement provisions which were unilaterally terminated by Respondent in violation of section 7116(a)(1) and (5) of the Statute. I agree that such agreements should be reinstated and Respondent required to honor said agreements until such time as they are changed or terminated through good faith negotiations.

With regard to Respondent's failure to install a silent alarm system in the cash clerks booth and the scheduling of interviews the General Counsel also requests a status quo ante remedy notwithstanding the fact that only impact and implementation negotiations would be appropriate.

At the hearing, Respondent argued that any status quo ante requirement which would require it to reduce employee management production for any period of time, would be severely disruptive of its operation, create a backlog of interviews and, thereby impair the efficiency and effectiveness of the Agency's operations. Significantly, the General Counsel did not respond directly to this argument either at the hearing or in its brief. While I do not deem Respondent's declaration that its operations would be disrupted by such a remedy as evidence of such disruption, I must note the Authority's recent decision in Department of the Treasury, Internal Revenue Service, Jacksonville District, Jacksonville, Florida, 15 FLRA No. 187. There the Authority found that a mere claim in a post hearing brief was sufficient to establish that returning to old methods would cause substantial disruption of government operations. Unlike that case, the General Counsel here had an opportunity to establish, on the record, that such disruption would not have been caused. If the Authority found the statement sufficient in the IRS, Jacksonville District case, it is plain, that here where the General Counsel had the opportunity to rebut Respondent's claim that a status quo ante remedy would be unwarranted.

Therefore, it is concluded, that a status quo ante remedy is not warranted in the instant matter. Accordingly, it is recommended that the Authority adopt the following:

ORDER

Pursuant to 5 U.S.C. § 7118(a)(7) and Section 2423.29 of the Final Rules and Regulations of the Federal Labor Relations Authority, U.S. Fed. Reg. 3842, 3510 (1980), it is hereby ordered that U.S. Immigration and Naturalization Service shall:

1. Cease and desist from:

(a) Rescinding or abrogating agreements made with American Federation of Government Employees, Local 1917, AFL-CIO, without affording it the opportunity to bargain concerning proposed changes.

(b) Unilaterally implementing changes in working conditions of employees in an appropriate unit without first notifying the American Federation of Government Employees, Local 1917, AFL-CIO, and affording it the opportunity to negotiate, to the extent consonant with law and regulations, concerning the impact and implementation of such changes.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purpose and policies of the Statute:

(a) Rescind the memorandum of August 5, 1981 concerning the abrogation of three (3) previously agreed to memoranda and reinstate those three (3) memoranda.

(b) Upon request of the American Federation of Government Employees, Local 1917, AFL-CIO, negotiate concerning the changes to be implemented which would change the three (3) previously negotiated memoranda.

(c) Upon request of the American Federation of Government Employees, Local 1917, AFL-CIO, negotiate concerning the impact and implementation of the new calendar procedure and the silent alarm system on the 10th floor concerning appropriate arrangements for employees who have been on may be adversely affected by such changes.

(d) Post at the U.S. Immigration and Naturalization Service facility at the New York District Office copies of the attached Notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the District Director and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including bulletin boards and other places where notices to employees are customarily posted. The District Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(e) Pursuant to Section 2423.30 of the Final Rules and Regulations, 45 Fed. Reg. at 3511, notify the Regional Director of Region 2, 26 Federal Plaza, Room 24-102, New York, New York 10278, in writing, within thirty days from the date of this Order, as to what steps have been taken to comply herewith.

Eli Nash, Jr.

ELI NASH, JR.
Administrative Law Judge

Dated: September 24, 1984
Washington, DC

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT abrogate or rescind agreements with American Federation of Government Employees, Local 1917, AFL-CIO, without affording it the opportunity to bargain concerning proposed changes in those agreements.

WE WILL NOT unilaterally implement changes in working conditions without first notifying the American Federation of Government Employees, Local 1917, AFL-CIO, and affording it the opportunity to negotiate, to the extent consonant with law and regulations, concerning the impact and implementation of such changes.

WE WILL rescind the memorandum of August 5, 1981, concerning the abrogation of three (3) previously agreed to memoranda and reinstate those three (3) memoranda.

WE WILL upon request, negotiate with the American Federation of Government Employees, Local 1917, AFL-CIO, concerning the impact and implementation of the new calendar procedure and the alarm system on the tenth floor concerning appropriate arrangements for employees who have been and may be adversely affected by such changes.

WE WILL upon request of the American Federation of Government Employees, Local 1917, AFL-CIO, negotiated concerning the changes to be implemented in the three (3) previously negotiated memoranda.

____
(Agency or Activity)

Dated: ____________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region 2, whose address is: 26 Federal Plaza, Room 24-102, New York, New York 10278 and whose telephone number number is: (212) 264-4934.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE (PTO)

Agency

and

Case No. 0-AR-1176

PATENT OFFICE PROFESSIONAL
ASSOCIATION (POPA)

Union

ORDER DISMISSING EXCEPTIONS

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to, and a request for a stay of, the interest arbitration award of Arbitrator Marvin E. Johnson filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

On April 29, 1986, the Arbitrator hand-delivered to the parties his resolution of their impasse on Article 15, Section 5 of the collective bargaining agreement, including subsections (B) and (C) as to which the Agency has filed exceptions. Thereafter, on May 27, 1986, in response to objections raised by the Agency, the Arbitrator issued a revised Article 15, Section 5. However, there were no material changes to subsections (B) and (C). On June 25, 1986, the Agency filed its exceptions contending that the award was deficient with respect to subsections (B) and (C).

III. ANALYSIS AND CONCLUSIONS

The exceptions are untimely. The Agency has essentially argued that the final award of the Arbitrator was issued and served on May 27 and that its exceptions of June 25 are timely. Contrary to the argument of the Agency, the Arbitrator's resolution on April 29, 1986, of the impasse over Article 15, Section 5 was final and not interlocutory for purposes of filing exceptions. The Article 15 delivered by the Arbitrator on April 29 does not indicate that it was intended to be interlocutory, and the affidavits submitted by the Agency to that effect are countered by affidavits submitted by the Union. Furthermore, management's submission of the April 29 award of the Arbitrator to the head of the Agency on May 1, 1986, for review under section 7114 does not support its contention before the Authority that this award was interlocutory.

Consequently, under section 7122(b) of the Statute and the Authority's Rules and Regulations, any exceptions to the award of April 29 had to be filed with the Authority by the close of business on May 29, 1986. Moreover, the Arbitrator's modification of the award in apparent response to the objections of the Agency did not operate to extend the time limit for filing exceptions. As the Authority has repeatedly indicated, only when a modification of an award by the arbitrator gives rise to the deficiencies alleged in the exceptions to the award has the Authority held that the filing period for exceptions began with the arbitrator's modification of the award. See, for example, U. S. Department of Health and Human Services, Social Security Administration and American Federation of Government Employees, AFL-CIO, 23 FLRA No. 19 (1986). In this case, however, it is clear that in his issuance of May 27, 1986, the Arbitrator did not modify his award so as to give rise to the deficiencies alleged by the Agency. To the contrary, the Arbitrator essentially reaffirmed his award. Thus, the Agency is in effect seeking Authority review of the April 29, 1986 award and the exceptions filed on June 25, 1986 are clearly untimely.

Accordingly, the Agency's exceptions and its request for a stay are dismissed.

For the Authority.

Issued, Washington, D.C., December 24, 1986.

Harold D. Kessler
Director, Office of Case Management

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. ARMY ARMAMENT RESEARCH,
DEVELOPMENT, AND ENGINEERING
CENTER (ARDEC), DOVER, NEW JERSEY

Activity

and Case No. 0-AR-1168

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES (NFFE), LOCAL 1437

Union

ORDER DISMISSING EXCEPTIONS

I. Statement of the Case

This matter is before the Authority on exceptions to the award of Arbitrator Robert S. Weaver filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. Arbitrator's Award

The grievant was removed from his position for submitting false travel vouchers for movement of household goods and transportation for himself and his family. He filed a grievance protesting the removal. The grievance was settled by an agreement under which (1) the grievant was reinstated in his position without backpay and (2) the approximately six months he was off work was treated as a suspension. Following the settlement agreement, the Activity sought reimbursement from the grievant of $6,941.73, the amount he received on the basis of the alleged false documents. A grievance was filed and submitted to arbitration. The Arbitrator framed the issues before him as follows:

> 1. Whether or not the Finance & Accounting Officer's demand for recoupment of money paid to [the grievant] for his Permanent Change of Station violates the Settle-

ment Agreement dated February 6, 1985 in FMCS File No. 84K/29968 in lieu of arbitration, and whether or not the Settlement Agreement resolved all outstanding issues.

2. If the answer to (1) is no, whether or not the Finance & Accounting Officer's claim is based on just cause, is fair [and] equitable.

3. The Employer raises the threshold issue of arbitrability.

The Arbitrator found essentially that the question of repayment should have been considered as part of the settlement agreement on the removal grievance and, further, that the question of repayment was within the sole jurisdiction of the Comptroller General. He denied the grievance as not arbitrable.

III. Analysis and Conclusions

The Authority has determined that it is without jurisdiction to review the Union's exceptions. Section 7122(a) of the Statute provides, in pertinent part:

> Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title).

As relevant to this case, the matters described in section 7121(f) of the Statute include adverse actions under 5 U.S.C. § 7512, such as a removal. Review of an arbitration award relating to such matters must be obtained in accordance with 5 U.S.C. § 7703, that is, in the same manner and under the same conditions as if the matter involved had been decided by the Merit Systems Protection Board. American Federation of Government Employees, Local 1857 and Sacramento Air Logistics Center, McClellan Air Force Base, 21 FLRA No. 41 (1986).

We find that the Arbitrator's award in this case related to the removal of the grievant, a matter covered by section 7512. The issue submitted to the Arbitrator directly concerned the interpretation and application of the settlement agreement under which the grievant's removal was changed to a suspension of approximately six months. In such circumstances, where the issue is not separate and distinct from the original issue of the grievant's removal, the Arbitrator's award relates to a matter described in section 7121(f) of the Statute. See Veterans Administration Medical Center, Hines, Illinois and Illinois Nurses Association, Hines Local Unit, 20 FLRA No. 61 (1985). See also Department of Justice, Bureau of Prisons and American Federation of Government Employees, Local 1741, 23 FLRA No. 102 (1986) (dismissing exceptions to an arbitrator's award finding an adverse action grievance not arbitrable, and noting among other things that such determinations may be reviewed by the U.S. Court of Appeals for the Federal Circuit.)

Because the Arbitrator's award relates to a matter covered by section 7512 (a removal), under section 7122(a) of the Statute exceptions to the award may not be filed with the Authority and the Authority is without jurisdiction to review the exceptions.

IV. Decision

For these reasons, the Union's exceptions are dismissed.

Issued, Washington, D.C. December 24, 1986.

J. L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

24 FLRA No. 80

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 916

Union

and　　　　　　　　Case No. 0-AR-1264

DEPARTMENT OF THE AIR FORCE,
TINKER AIR FORCE BASE,
OKLAHOMA

Agency

ORDER DISMISSING EXCEPTIONS

This case is before the Authority on exceptions to the award of Arbitrator Jay C. Fogelberg filed by the Union pursuant to section 7122(a) of the Federal Service Labor-Management Relations Statute and section 2425.1 of the Authority's Rules and Regulations. For the reasons stated below, it has been determined that the exceptions must be dismissed as untimely filed.

The Arbitrator's award is dated September 24, 1986, and appears to have been served on the parties by mail on the same day.

Under section 7122(b) of the Statute, as amended, [1] and section 2425.1 of the Authority's Rules and Regulations, as amended, [2] which amendments are applicable to exceptions pending or filed with the Authority on or after

---

[1] Section 7122(b) of the Statute was amended by the Civil Service Miscellaneous Amendments Act of 1983 (Pub. L. No. 98-224, § 4, 98 Stat. 47, 48 (1984)) to provide that the 30-day period for filing exceptions to an arbitrator's award begins on the date the award is served on the filing party.

[2] 49 Fed. Reg. 22623 (1984).

March 2, 1984, and under sections 2429.21 and 2429.22 of the Rules and Regulations, which are also applicable to computation of the time limit here involved, any exceptions to the Arbitrator's award in this case had to be filed with the Authority no later than the close of business on October 28, 1986. However the exceptions were not filed until November 5, 1986. Therefore, the exceptions were untimely filed.

Accordingly, as the Union's exceptions were untimely filed, they are hereby dismissed.

For the Authority.

Issued, Washington, D.C., December 24, 1986.

Harold D. Kessler
Director of Case Management

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, NATIONAL COUNCIL
OF SOCIAL SECURITY FIELD OFFICE LOCALS

Union

and

Case No. O-NG-1076

DEPARTMENT OF HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of thirteen Union proposals.1/

II. Proposal 1 - Part D.1.

> Every employee working on a VDT (VDT Display Terminal) shall be required to take a rest break away from his or her machine; such breaks to be for 15 minutes, in addition to regularly scheduled breaks, and shall occur after every hour of work on the terminal.

1/ We will not further consider in this decision three additional proposals contained in the petition for review. The Union withdrew proposals on Part E.7. and Part E.17. and the Agency withdrew its allegation of nonnegotiability on Part E.10.

A. Positions of the Parties

The Agency contends that the proposal violates its right under section 7106(a) to assign work and to determine when the work will be performed.

The Union contends that the proposal does not concern the assignment of work. It also contends that the proposal is "essentially an arrangement by which the Employer's decision to institute new technology would be applied."

B. Conclusion and Analysis

Proposal 1 is within the duty to bargain. We find that for the reasons which follow the proposal is not inconsistent with applicable laws and Government-wide regulations governing rest periods or with management's rights under the Statute.

The Agency relies on the Authority's decision in National Federation of Federal Employees, Local 1263 and Defense Language Institute, Foreign Language Center, Presidio of Monterey, California, 7 FLRA 723 (1982) to support its claim that the proposal is not negotiable. Such reliance is misplaced. In that case the proposals held nonnegotiable allocated specific amounts of time to accomplish particular duties. In contrast, the proposal in this case does not speak to whether work will be performed, what work will be performed, or when it will be performed--this proposal is only concerned with securing periodic rest breaks for employees who management assigns to work at video display terminals.

In American Federation of Government Employees, AFL-CIO, Local 3511 and Veterans Administration Hospital, San Antonio, Texas, 12 FLRA 76, 84-88 (1983), the Authority held a proposal requiring that certain employees "will be given two uninterrupted rest periods during each eight hour tour of duty" to be within the duty to bargain. It found that (1) granting rest periods is a matter within an agency's discretion; (2) employees remain in a duty status during their rest periods; and (3) management therefore retains the right to assign work to them during their rest periods under section 7106(a)(2)(B). Similarly, in American Federation of Government Employees, Local 3342, AFL-CIO and Department of

Health and Human Services, Social Security Administration, 19 FLRA No. 124 (1985), the Authority held that scheduling breaks to which employees are entitled based upon the parties' agreement is likewise within the duty to bargain.

In the present case, the Agency did not indicate that it would be unable to assign VDT work during the rest periods or that non-VDT work did not exist. Therefore, if workload requires, the Agency can assign VDT work during the rest periods or assign non-VDT work--for example, filing--during the rest periods. Compare American Federation of State, County and Municipal Employees, Local 2477, AFL-CIO and Library of Congress, 23 FLRA No. 27, slip op. at 4-5 (1986) (proposal would preclude agency from assigning work during clothes changing period.)

Thus, the proposal in this case bears no material difference from those previously held negotiable in the cited cases. Accordingly, in light of that precedent, we find Proposal 1 to be within the duty to bargain.

III. Proposals 2 through 12

> Proposal 2 - Part E.1.
>
> Adjustable chair, foot rests and tables to allow for adjustment of individual machines to suit each operator shall be available to provide optimum comfort for heights, back and tension and the minimum amount of physical stress for each operator. Chairs with full length and half length arm rests as well as chairs without arm rests shall be provided.

> Proposal 3 - Part E.2.
>
> The above furniture will be adjustable to the extent that each employee will be able to achieve a .2m knee clearance between seat and table, maximum viewing distance from screen of .7m, screen at approximately right angles to line of sight, keyboard at approximately .7m above ground, and can change arm rest style.

Proposal 4 - Part E.3.
Dimmer switches will be installed so the VDT operator can adjust the illumination from 1600 lux to 300 lux as needed.

Proposal 5 - Part E.5.
Workstations should be adjustable so that while typing the angle of the forearms is 90 to 100 degrees.

Proposal 6 - Part E.6.
VDT workstations should be adjustable to accommodate the 5th and 95th percentiles.

Proposal 7 - Part E.8.
All working surfaces and the paneling around the workstation should be low reflecting.

Proposal 8 - Part E.9.
Each VDT shall be provided with radiation protection shields. Equipment that is already in place must be inspected and fitted with such shields.

Proposal 9 - Part E.12.
Ionizing radiation levels of the VDT's shall not exceed .5 millirems per hour when measured at 2" from the screen.

Proposal 10 - Part E.13.
Each VDT shall have an effective glare shield.

Proposal 11 - Part E.16.
Terminals shall not be arranged so as to direct the primary heat exhausts, without intervening ducts walls or insulation, within four (4) feet of the place where any person is stationed for periods of time.

Proposal 12 - Part E.18.
The noise of printers used in the offices will not exceed 60 decibels at any point in the office.

A. Positions of the Parties

The Agency contends the proposals involve the technology of performing work under section 7106(b)(1) and are therefore negotiable only at its election. The Agency also contends that it must first determine that a health hazard exists before such special equipment can be purchased citing Department of the Army, Ohio River Division, Corps of Engineers--National Federation of Federal Employees, Local No. 892, 63 Comp. Gen. 278 (1984). In this regard, it is apparently claiming that its discretion to purchase the equipment covered by the proposals may be limited by standards promulgated in the cited Comptroller General (CG) decision.

The Union contends that the proposals do not interfere with the VDT technology the Agency has chosen for the new claims modernization process. It also contends the proposals provide an "appropriate arrangement for employees affected by the VDT's."

B. Conclusion and Analysis

Proposals 2 through 12 are within the duty to bargain.

As discussed below, the proposals are incidental to and not determinative of the VDT technology adopted by the Agency for the performance of its work. They are principally related to matters affecting the working conditions of employees using the VDT's but do not interfere with the use of that technology or the purpose for which it was adopted. The proposals therefore would not interfere with the Agency's right to determine the technology of performing its work within the meaning of section 7106(b)(1).

1. The proposals do not directly interfere with management's right to determine the technology used to perform its work within the meaning of section 7106(b)(1).

To sustain a claim that a proposal concerning conditions of employment is negotiable only at the election of management because it directly interferes with management's right to determine the technology used in performing its work, an agency must establish:

> (1) the technological relationship of the proposal to accomplishing or furthering the performance of the agency's work; and

(2) how the proposal would interfere with the purpose for which the technology was adopted.

In the absence of such showings, the proposal is considered incidental to the performance of the agency's work and principally related to matters affecting the working conditions of employees. It is, if consistent with applicable laws and regulations, within the duty to bargain. American Federation of State, County and Municipal Employees, AFL-CIO, Local 2477 and Library of Congress, Washington, D.C., 7 FLRA 578, 584 (1982), enforced as to other matters sub nom. Library of Congress v. Federal Labor Relations Authority, 699 F.2d 1280 (D.C. Cir. 1983).

The Authority has previously found that similar equipment related to matters affecting the working conditions of employees. See Social Security Administration, Office of Hearings and Appeals, Region II, New York, New York, and American Federation of Government Employees, AFL-CIO, Local 1760, 19 FLRA No. 47 (1985) (Proposal 16-concerning arrangements for isolating word processing equipment that makes excessive noise.)

To support its claim that the proposals are nonnegotiable, the Agency relies on the Authority's decisions in: American Federation of Government Employees, Local 644, AFL-CIO and U.S. Department of Labor, Mine Health and Safety Administration, Morgantown, West Virginia, 15 FLRA 902 (1984); National Federation of Federal Employees, Council of Consolidated Social Security Administration Locals and Social Security Administration, 13 FLRA 422 (1983); and American Federation of State, County and Municipal Employees, AFL-CIO, Local 2477 and Library of Congress, Washington, D.C., 7 FLRA 578 (1982). The Agency implies that these cases establish that a proposal requiring an agency to provide employees with any specified equipment is determinative of the "technology of performing work" within the meaning of section 7106(b)(1). Such a generalization misstates the Authority's holdings in the cited cases.

In Mine Health and Safety Administration and in Social Security Administration, the proposals which the Authority found interfered with management's right to determine the technology of performing work each expressly required the agency to provide equipment which was part of the technical method of performing the agency's work -- telephones in the former and calculators with memory and percentage functions in the latter. In Library of Congress the Authority found a part of Proposal 9 concerning the agency's choices of equipment or facilities to be drafted so broadly as to require negotiations over all equipment and facilities, including those involving the technical method used by the agency for performing its work. The Authority specifically stated in that decision, however, that a proposal focusing on particular equipment which did not constitute part of the technical method used by an agency for accomplishing its work would be within the duty to bargain.

In the present case, the Agency has not established that a technological relationship exists between the proposed equipment standards and arrangements and performing the Agency's work. Second, it has not established in any event that such standards and arrangements if agreed upon would interfere in any way with the purpose for which the Agency has adopted VDT technology to perform its work. Accordingly, it follows under Library of Congress that the Agency has not established that the proposals directly interfere with its right to determine the technology of performing its work.

2. Comptroller General decisions cited by the Agency do not render the proposals nonnegotiable.

The Agency claims but has not established, nor is it otherwise apparent, that under Comptroller General decisions the Agency is without discretion to comply with the proposals, if agreed upon. An agency bears the burden of creating a factual record sufficient for the Authority to resolve the negotiability dispute. National Federation of Federal Employees, Local 1167 v. Federal Labor Relations Authority, 681 F.2d 886, 891 (D.C. Cir. 1982), aff'g National Federation of Federal Employees, Local 1167 and Department of the Air Force, Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida, 6 FLRA 574 (1981).

Under the Comptroller General decision cited by the Agency, it is clear that personal or special equipment may be purchased if the criteria established by the Comptroller General are met. Ohio River Division, 63 Comp. Gen. at 280-81. That is, the Agency has some, if not total discretion in such matters. The lack of total discretion to implement a proposal is not a basis for finding an otherwise negotiable proposal outside the duty to bargain. Lacking total discretion, the Agency's duty to bargain extends to such matters as are within its discretion.[2] American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management, Washington, D.C., 8 FLRA 409, 411 (1982). Moreover, the Comptroller General has set forth criteria for determining circumstances in which an agency could purchase personal equipment in the absence of specific statutory authority. See Secretary of War, 3 Comp. Gen. 433 (1924). For application of the criteria see also Secretary of the Interior, 45 Comp. Gen. 215 (1965) and Ohio River Division, 63 Comp. Gen. at 281.

IV. Proposal 13 - Part E.19.

> The indoor temperature in the office shall not fall below 65 degrees and in hot weather, adequate ventilation and air conditioning will be provided.

A. Positions of the Parties

The Agency contends that the proposal conflicts with the parties' National Agreement, Article 9 - Section 8 (Temperature Conditions). It contends that the National Agreement's procedures should be used to resolve issues about the work site's temperature.

The Union contends that the National Agreement provision does not waive its right to negotiate appropriate arrangements and procedures for a mid-term change in technology.

B. Conclusion and Analysis

The proposal is within the duty to bargain.

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[2] Chairman Calhoun agrees with this analysis in this case. He believes, however, that there is an affirmative obligation to examine not only whether and to what extent an agency has discretion in a matter, but also to weigh the interests of the parties and all related policy considerations. Members Frazier and McKee adhere to the view expressed in the majority opinion in American Federation of Government Employees, AFL-CIO, Local 1897 and Department of the Air Force, Eglin Air Force Base, Florida, 24 FLRA No. 41 (1986) (Chairman Calhoun Dissenting), that: "It is well settled that matters which are conditions of employment of employees in a bargaining unit and are within the discretion of the agency involved are within the duty to bargain."

In Internal Revenue Service, Chicago, Illinois and National Treasury Employees Union (NTEU) and NTEU, Chapter 95, 9 FLRA 648, 651 (1982), the Authority found that the correction of heating and air conditioning problems in office areas affected the working conditions of employees and is within the duty to bargain under the Statute. In the present case, the only argument raised by the Agency is that negotiations on the proposal are barred by a master agreement. The record in this case fails to provide any basis for substantiating the Agency's assertions. Further, to the extent that there are factual issues in dispute between the parties concerning the duty to bargain in the specific circumstances of this case, these issues may be resolved in other appropriate proceedings. See American Federation of Government Employees, AFL-CIO, Local 2736 and Department of the Air Force, Headquarters, 379th Combat Support Group (SAC), Wurtsmith Air Force Base, Michigan, 14 FLRA 302, 306 n.6 (1984). In addition, the proposal is not inconsistent with Government-wide regulations concerning the temperature in general office space. See 41 CFR § 101-20.116-3 (1986).

V. Order

The Agency must bargain upon request, or as otherwise agreed to by the parties, concerning Proposals 1 through 13.[3]

Issued, Washington, D.C. December 24, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

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[3] In finding these proposals to be within the duty to bargain, the Authority makes no judgment as to their merits.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

LOCAL 1749, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
Union

and

Case No. 0-AR-1209
(24 FLRA No. 15)

COMMANDER, 47FTW, LAUGHLIN
AIR FORCE BASE, TEXAS

Agency

ORDER DENYING MOTION FOR RECONSIDERATION

This case is before the Authority on a motion for reconsideration filed by the Union on December 9, 1986, seeking reconsideration of the Authority's Decision and Order of November 21, 1986. For the reason set forth below, the motion must be denied.

Section 2429.17 of the Authority's Rules and Regulations, effective September 10, 1981, provides in pertinent part:

> 2429.17 Reconsideration.
>
> After a final decision or order of the Authority has been issued, a party to the proceeding before the Authority who can establish in its moving papers extraordinary circumstances for so doing, may move for reconsideration of such final decision or order. The motion shall be filed within 10 days after service of the Authority's decision or order. . . .

The Authority's Decision and Order was dated and served on the Union by mail on November 21, 1986. Therefore, under section 2429.17 of the Authority's Rules and Regulations, and sections 2429.21 and 2429.22, which are also applicable to the computation of the time limit here involved, the Union's motion for reconsideration was due in the national office of the Authority before the close of business on December 8, 1986. Since, as indicated above, the Union's motion was not filed until December 9, 1986, it is clearly untimely and must be denied.

Accordingly, the Union's motion for reconsideration is denied.

For the Authority.

Issued, Washington, D.C., December 24, 1986.

Harold D. Kessler

Harold D. Kessler
Director of Case Management

☆U.S. G.P.O. 1987-181-223:60002

9/Case No. 416

Federal Labor Relations Authority

Washington, D.C. 20424

NUMBER 416 REPORT OF CASE DECISIONS December 29, 1986

UNFAIR LABOR PRACTICE CASES

24 FLRA No. 82 (December 29, 1986)

Equal Employment Opportunity Commission and Edgard Martinez, an individual, Case No. 3-CA-50243

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24 FLRA No. 83 (December 29, 1986)

Department of the Air Force Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio and American Federation of Government Employees, Council 214, AFL-CIO, Case No. 5-CA-60110

24 FLRA No. 84 (December 29, 1986)

United States Department of Housing and Urban Development, Region VI and United States Department of Housing and Urban Development, Region VI, San Antonio Area Office and American Federation of Government Employees, AFL-CIO, Local 3320, Case No. 6-CA-20311

24 FLRA No. 86 (December 29, 1986)

Department of the Navy, Northern Division, Naval Facilities Engineering Command and National Federation of Federal Employees, Local 1430, Case No. 2-CA-1091

Y3.F31/21-3:

ARBITRATION CASE

24 FLRA No. 85 (December 29, 1986)

Veterans Administration Medical Center, Leavenworth, Kansas and American Federation of Government Employees Local 85 (Eisler, Arbitrator), Case No. 0-AR-1127

Federal
Labor Relations
Authority

24 FLRA No. 82

EEOC and Edgard Martinez, Case No. 3-CA-50243 (Decided December 29, 1986

SUBJECT MATTER INDEX ENTRIES

AGENCY ULP (ALLEGED) 7116(a)(2)
  DISCIPLINE OF EMPLOYEE
DISCIPLINE OF EMPLOYEES
  NOTIFICATION OF POTENTIAL OR PENDING DISCIPLINE
    REFERENCE TO PROTECTED ACTIVITY
  REASONS FOR DISCIPLINE
    ENCOURAGING RACIAL STRIFE
    HOSTILE ATTITUDE
    UNPROFESSIONAL CONDUCT
  PROTECTED ACTIVITY
    MIXED MOTIVES FOR DISCIPLINE
      TEST FOR DETERMINING WHETHER THE STATUTE WAS VIOLATED
    REFERENCE OF PROTECTED ACTIVITY IN NOTICE OF DISCIPLINE
  TERMINATION FOR CAUSE OF AN EMPLOYEE WHO HAD EXERCISED HIS RIGHTS
GRIEVANCE PROCEDURE, NEGOTIATED
  ABUSE OF GRIEVANCE PROCEDURE
UNFAIR LABOR PRACTICES, REMEDIES FOR AGENCY VIOLATIONS
  REMOVE REFERENCED FROM PERSONNEL AND OTHER FILES

STATUTE

7102
7116(a)(1) and (2)
7118

DIGEST NOTES

The agency did not violate section 7116(a)(1) and (2) when it terminated an employee who had filed several grievances under the parties negotiated grievance procedures. While the filing of grievances is a protected activity and the agency's termination of the employee was motivated in part by this activity, the agency was able to show by a preponderance of the evidence that it would have reached the same decision in the absence of the protected activity. The employee, a general attorney, promoted racial strife among the staff and management; his conduct was disruptive and unprofessional with management officials and fellow employees; and he had a hostile attitude and manner of dealing with management.

The agency violated section 7116(a)(1) when it included as a basis for termination in a notice to the employee of the agency's proposed action, the processing of grievances by the employee.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

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Federal
Labor Relations
Authority

24 FLRA No. 83

Dep't of the Air Force, HQ,
Air Force Logistics Command,
Wright- Patterson Air Force
Base, Ohio and AFGE, Council
214, Case No. 5-CA-60110
(Decided December 29, 1986)

SUBJECT MATTER INDEX ENTRIES

- AGENCY ULP (ALLEGED) 7116(a)(5)
  - ARBITRATION
    - REFUSAL TO COMPLY WITH AN AWARD
- ARBITRATION
  - MULTIPLE GRIEVANCE ARBITRATION
- ENFORCEMENT AND COMPLIANCE
  - ARBITRATION AWARDS
    - AWARD NOT ENFORCED
    - TYPE / NATURE OF AWARD FOR WHICH ENFORCEMENT WAS SOUGHT
      - MULTIPLE GRIEVANCE ARBITRATION
- EXECUTIVE ORDERS
  - 13(a)
  - 13(b)

STATUTE

- 7116(a)(1), (5) and (8)
- 7121(a)(1)
- 7121(b)(3)(C)
- 7118

DIGEST NOTES

The activity did not violate section 7116(a)(1) and (5) when it filed a grievance concerning the unilateral action of the exclusive representative in combining separate grievances for arbitration. The charging party alleged that an earlier arbitration award permitted the joining of two or more separate grievances into one arbitration proceeding, or, at least, required bargaining on the joining issue. However, the Judge found that the earlier arbitration award pertained to only the issues then before the arbitrator and did not create a bargaining obligation. Also, the charging party alleged that the arbitrator would have had to reach the desired outcome based on past practice and previous arbitration awards. However, the Judge found that three arbitration proceedings referred to by the charging party could not establish a past practice. Moreover, the Judge held that arbitrators are not bound by stare decisis. A arbitrator may follow arbitral precedent but is under no compunction to do so and examples are legion where arbitrators have departed from arbitral precedent involving the same issues.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

24 FLRA No. 84

HUD, Region VI and HUD, Region VI, San Antonio Area Office and AFGE, Local 3320, Case No. 6-CA-20311 (Decided December 29, 1986)

Federal Labor Relations Authority

SUBJECT MATTER INDEX ENTRIES	STATUTE
ATTORNEY FEES	7116(a)(1) and (2)
CRITERIA FOR AN AWARD	
BACK PAY ACT	
5 U.S.C. 7701(g)	
INTEREST OF JUSTICE STANDARD	
BULLETIN BOARDS	
STATEMENTS CRITICAL OF MANAGEMENT	
STANDARDS OF CONDUCT, EMPLOYEE AND MANAGEMENT OFFICIALS	
GOOD FAITH BELIEF THAT ACCUSATIONS ARE TRUE	
UNITED STATES CODE	
5 U.S.C. 2302(b)(8)	
5 U.S.C. 2302(b)(9)	
5 U.S.C. 2302(b)(11)	
5 U.S.C. 5596 [BACK PAY ACT]	
5 U.S.C. 5596(b)(1)(A)(ii)	
5 U.S.C. 7701(g)	
5 U.S.C. 7703(b)(1)	
28 U.S.C. 1920(2)	
42 U.S.C. 2000e-5(k)	

DIGEST NOTES

The Authority awarded attorney fees to an employee (the local union president) who was suspended for 5 work days for posting statements critical of management on the union bulletin board. The award meets the threshold requirements that (1) the employee suffered an unwarranted or unjustified personnel action; (2) the employee incurred the attorney fees; (3) The employee was the prevailing party in the proceeding for which the award is sought. Under 5 U.S.C. 7701(g), if an obligation to pay fees has been incurred and the employee is a prevailing party, an award can be made if it is warranted in the interest of justice. The requested billing rate of $90 / hour for 26.5 hours is reasonable.

Counsel also requested $82.35 for the cost of the trial transcript. However the Authority denied the request of $ 82.35/hour for "taxable costs" There is no statutory right of recovery for stenographic fees for transcripts in an administrative proceeding.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Federal Labor Relations Authority

24 FLRA No. 85

VA Medical Center, Leavenworth, Kansas and AFGE, Local 85 (Eisler, Arbitrator), Case No. 0-AR-1127 (Decided December 29, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
ARBITRATION AWARDS, EXCEPTIONS:	7122(a)

ARBITRATION AWARDS, EXCEPTIONS:
  ARBITRATOR EXCEEDED HIS AUTHORITY [BY:]
    DIRECTING AGENCY TO SEEK AN AMENDMENT TO OPM'S REGULATIONS
  AWARD CONTRARY TO APPLICABLE RULE OR REGULATION
    FPM SUPPLEMENT 532-1
    5 C.F.R. 550.901 ET SEQ.
  AWARD CONTRARY TO APPLICABLE LAW
    5 U.S.C. 5596 [BACK PAY ACT]
ARBITRATION AWARDS, REMEDIES ORDERED BY ARBITRATORS
  HAZARDOUS DUTY PAY [5 U.S.C. 5545]
  DIRECTED AGENCY TO SEEK AN AMENDMENT TO OPM'S REGULATIONS
CODE OF FEDERAL REGULATIONS
  5 C.F.R. PART 550, APPENDIX A
  5 C.F.R. 550.901 ET SEQ.
  5 C.F.R. 550.903
FEDERAL PERSONNEL MANUAL
  SUPPLEMENT 532-1, APPENDIX J
  SUPPLEMENT 532-1
  SUPPLEMENT 532-1, SUBCHAPTER S8-7f
PREMIUM PAY
  ENVIRONMENTAL DIFFERENTIAL
    ASBESTOS EXPOSURE
UNITED STATES CODE
  5 U.S.C. 5596 [BACK PAY ACT]

DIGEST NOTES

The arbitrator found that a provision in the parties' collective bargaining agreement authorized environmental differential pay (EDP) for Wage Grade employees and intermittent General Schedule employees in accordance with OPM regulations for exposure to airborne asbestos fibers. He awarded hazardous duty pay and directed the activity to request, through its central office, an amendment to OPM's regulations so that General Schedule employees properly could receive hazardous duty pay for their exposure to asbestos.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

In its exceptions the agency alleged that the award of environmental differential pay to Wage Grade employees was contrary to FPM Supplement 532-1 and Appendix J; that the award of EDP was contrary to the Back Pay Act, 5 U.S.C. 5596; that th award of hazardous duty pay to General Schedule employees is contrary to 5 C.F.R. 550.901-907 and Appendix A; and that the arbitrator exceeded his authority in directing the agency to request an amendment to OPM's regulations. The Authority concluded that the agency's exceptions did not provide a basis for finding the award deficient.

Federal Labor Relations Authority

24 FLRA No. 86

Dep't of the Navy, Northern Division, Naval Facilities Engineering Command and NFFE, Local 1430, Case No. 2-CA-1091
(Decided December 29, 1986)

SUBJECT MATTER INDEX ENTRIES

- AGENCY ULP (ALLEGED) 7116(a)(5)
  - COMPENSATION SYSTEM
    - INCENTIVE AWARDS
- ASSIGN WORK, RESERVED MANAGEMENT RIGHT
  - PERFORMANCE APPRAISAL SYSTEM
- DIRECT EMPLOYEES, RESERVED MANAGEMENT RIGHT
  - PERFORMANCE APPRAISAL SYSTEM
- PERFORMANCE APPRAISAL SYSTEM
  - AWARDS / REWARDS
    - COMMITTEE
      - UNION OBSERVER ON COMMITTEE THAT MAKES SUGGESTIONS
    - CRITERIA OR STANDARDS GOVERNING AWARDS
      - LEVEL OF ACHIEVEMENT OR PERFORMANCE RATING
        - NOT WITHIN MAN. RIGHTS TO ASSIGN WORK; DIRECT EMP.
- UNFAIR LABOR PRACTICES, REMEDIES FOR AGENCY VIOLATIONS
  - RESCIND A CHANGE CONSISTENT WITH LAW AND GOVERNMENT-WIDE REG.
  - STATUS QUO ANTE
    - APPROPRIATE AND WARRANTED
      - UNILATERAL CHANGE INVOLVED A NEGOTIABLE WORKING CONDITION
- UNITED STATES CODE
  - 5 U.S.C. 4302

STATUTE

7116(a)(1) and (5)
7118

DIGEST NOTES

The particular level of job performance that warrants granting an incentive award is not included within management's rights to assign work and direct employees for this case. Thus, the activity was obligated to bargain with the union over its decision to changed the role of an incentive awards committee on which the union served as an observer, the Authority held on remand. The committee reviewed proposed quality step increases, outstanding performance ratings, sustained superior performance awards, in addition to unsatisfactory ratings, beneficial suggestions, and special achievement awards, and made recommendations thereon to the commander of the activity. The

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Authority accepted as law in this case the opinion of the U.S. Court of Appeals for the District of Columbia Circuit that was expressed in a previous decision. Thus, when the activity unilaterally changed the function of the committee, it violate section 7116 (a)(1) and (5).

A status quo ante remedy is warranted where management ha made a unilateral change in a negotiable term and condition of employment, absent special circumstances, in order not to rend meaningless the material obligation to negotiate. Thus the Authority ordered a status quo ante remedy in this case for th activity's failure to negotiate with the union over its decisi to change the function of an incentive awards committee on whi union representatives served.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION

Respondent

and

Case No. 3-CA-50243

EDGARD MARTINEZ

Charging Party/Individual

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions to the attached decision of the Administrative Law Judge filed by the Respondent. The General Counsel filed an opposition to the exceptions. The complaint alleged that the Respondent violated sections 7116(a)(1) and (2) of the Statute by discharging an employee because of his activity in filing grievances. Additionally, the complaint alleged that the Respondent committed an independent violation of 7116(a)(1) by alluding to the employee's grievances in a Notice of Proposal to Remove to support a charge of disruptive and unprofessional conduct. In disagreement with the Judge we find that the Respondent did not violate the Statute in discharging the employee. However, we find that the Respondent did violate section 7116(a)(1) by alluding to the employee's grievances as support for the action in the Notice.

II. Background Facts

As the pertinent facts of this case are fully set forth in the Judge's Decision, they will be discussed only briefly. During the summer of 1984, the employee, Martinez, became concerned about changes made by management in the manner in which he was required to perform his duties. In reaction to these changes, Martinez filed four grievances under the applicable negotiated grievance procedure. The first grievance was initiated on July 13, 1984, and the fourth grievance was initiated on September 25, 1984. All of the grievances were denied by the Respondent with the last decision issuing on October 11, 1984.

Martinez received a "Notice of Proposal to Remove" on October 12 and submitted a formal response on October 24. On October 26 Martinez as notified of the Respondent's decision to remove him effective November 2, 1984. As more fully set forth in the Judge's decision, Respondent noted in essence in taking such action that:

(1) Martinez had promoted racial strife among the staff and management in the Office of Review and Appeals by informing a former co-worker that he received his promotion only because he is white, by encouraging a black employee to file an EEO complaint regarding her non-selection for the same promotion, and by making allegations that white employees have received more difficult case assignments.

(2) Martinez had demonstrated disruptive, unprofessional conduct and made himself extremely difficult to supervise by seldom accepting assignments or taking directions without challenging authority. A written reprimand issued September 10, 1984, stated that in objecting to a priority assignment, Martinez flew into a rage, slammed the file on his desk, yelled at his supervisor so loudly that he was heard clearly several offices away, and refused to do more work (Tr 418-19, 425). In addition, the written reprimand referred to other specific incidents of disrespect and hostile conduct occurring early in September as well as previous incidents. The concluding paragraph of the reprimand stated: "[T]his hostile conduct of jumping to conclusions, making unfounded accusations, and consistently questioning direct supervisory instructions cannot be condoned." The Respondent also contended that Martinez abused the grievance process by continuing to demand information and submitting numerous memoranda necessitating interim answers on his pending grievances which occupied his supervisor's work time and prevented her from processing the cases submitted to her for approval.

(3) Martinez had maintained a hostile attitude in dealings with management as demonstrated by his continuing failure to accept assignments or take direction without requiring the direction to be in writing, with specific instructions on how to deal with cases, by making untrue allegations at a general staff meeting that management assigned him almost nothing but merit cases, and by being extremely abusive, loud and disrespectful toward the Director in public on one occasion.

See Administrative Law Judge's Decision, at 5-7.

III. Administrative Law Judge's Decision

The Judge found that Martinez had made various remarks to employees and management officials attributed to him in the Notice of Proposal to Remove. The Judge further concluded, however, that although the Respondent was well aware of Martinez's objectionable conduct during the April-September 1984 period, no formal discipline of any kind was imposed until September 10, 1984, when he received a written reprimand for insubordinate conduct in connection with his handling of a priority case assignment. The Judge found that while his supervisor claimed to have counseled Martinez concerning his attitude, she had done no more than indicate her displeasure on a number of occasions when Martinez displayed what she considered unacceptable behavior. The Judge found it significant that the supervisor did not enter any notations of her counseling in his personnel file. The Judge noted that only after Martinez began to file the grievances did Respondent begin to investigate and collect statements from employees involved in the incidents used to establish a basis for charging Martinez with unacceptable conduct. Regarding Martinez's alleged abuse of the grievance procedure, the Judge found that Martinez's actions in actively pursuing his grievances by seeking information and interim answers to questions concerning his grievances did not exceed the ambit of protected activity. In view of the above, the Judge found it unnecessary to reach the alleged independent violation of section 7116(a)(1) contained in the complaint.

IV. Position of the Parties

The Respondent's exceptions challenge the Judge's findings regarding its motives in discharging Martinez and the Judge's recommended Order reinstating Martinez. Essentially, Respondent reiterates the same arguments it presented at the hearing regarding its motivation and the basis for its decision to terminate Martinez. The Respondent contends that Martinez's methods of pursuing his grievances were not protected under the Statute. The Respondent argues that Martinez used the grievance procedure to create disruptions, tension and suspicion in the workplace, and as leverage in an attempt to prevent management from performing its legitimate functions and duties. For example, the Respondent alleges that Martinez's continuous demands for information regarding his grievances created a burden which unduly prevented management officials from accomplishing other work. The Respondent further contends that it would have discharged Martinez even if he had not filed grievances and actively pursued them under the negotiated grievance procedure. At the time of his removal, the Respondent contends that Martinez was failing to perform his work in a satisfactory manner, had fomented discontent, and had engaged in an ever increasing pattern of unacceptable behavior toward his fellow employees and supervisors which had an adverse effect on the operation of his section. Accordingly, the Respondent argues that no violation of the Statute occurred and that the remedy recommended by the Judge, that Martinez be reinstated and made whole, is inappropriate and unjustified by the record.

The General Counsel, in its opposition to Respondent's exceptions, supports the findings of the Judge that the primary reason for Martinez's discharge was not his performance or conduct as an employee, but retaliation for his filing and actively pursuing grievances under the negotiated procedure. The General Counsel supports the Judge's conclusion that Respondent by its conduct violated section 7116(a)(1) and (2) of the Statute. Moreover, the General Counsel urges the Authority to find that Respondent independently violated section 7116(a)(1) of the Statute by including as a basis for termination in the Notice of Proposal to Remove the filing of grievances.

V. Analysis

A. Termination of Martinez

The Respondent's exceptions raise two defenses. First, Respondent argues that Martinez was not discharged for having engaged in protected activity since the charges relating to his conduct in pursuing his grievances under the negotiated procedure did not involve conduct that was protected under the Statute. The Respondent also contends that it would have removed Martinez, notwithstanding the conduct relating to his grievances, based on the other conduct contained in the Notice of Proposal to Remove.

(1) Active Pursuit of Grievance is Protected Activity

Section 7116(a)(1) of the Statute provides that it is an unfair labor practice for an agency to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under the Statute. It is well established that an employee's right to file and process grievances under a collective bargaining agreement is protected activity within the meaning of section 7102 of the Statute and that management's actions which tend to interfere with or restrain the exercise of such rights constitutes unlawful interference in violation of section 7116(a)(1). Internal Revenue Service and Brooklyn District Office, 6 FLRA 642 (1981). Noting particularly that the Respondent's contention that Martinez abused the grievance process was based on the fact that Martinez continued to demand information and submitted numerous memoranda necessitating interim answers on his pending grievances, we agree with the Judge's finding that Martinez's action in actively pursuing his grievances did not exceed the ambit of protected activity.

(2) Termination Based on Mixed Motive

With regard to Respondent's second defense, that Martinez would have been removed for other reasons not withstanding his conduct related to his grievances, the Authority in Internal Revenue Service, Washington, D.C., 6 FLRA 96 (1981) enunciated a test for determining whether a violation of the Statute has been committed in such mixed motive situations. Under that test the burden is on the General Counsel to make a *prima facie* showing that the employee had engaged in protected activity and that this conduct was a motivating factor in an agency's decision to act against the employee. If and when a *prima facie* case is established, the Respondent then has to show by a preponderence of the evidence that it would have reached the same decision in the absence of the protected conduct.

In its Notice of Proposal to Remove, the Respondent in this case concluded based on specific incidents credited by the Judge:

(1) that Martinez had promoted racial strife among the staff and management in the Office of Review and Appeals;

(2) that he had been disruptive and unprofessional in his conduct with management officials and fellow employees; and

(3) that he had a hostile attitude and manner of dealing with management.

Among the incidents relied on to support the above conclusions, the Respondent asserted that Martinez abused the grievance process by demanding information and submitting numerous memoranda concerning his grievances which prevented his supervisor from working on other matters. However, the main theme running through the Notice as well as the written reprimand of September 10, is the Respondent's conclusion that Martinez had established a pattern of misconduct that was incompatible with his position as a General Attorney in the Appeals Division of the Equal Employment Opportunity Commission's Office of Review and Appeals.

In agreement with the Judge, we conclude based on the Notice of Proposal to Remove and the testimony credited by the Judge that the General Counsel established that the employee engaged in protected activity and that such activity was a motivating factor in the decision to remove him. We further find, in disagreement with the Judge, that the Respondent established that it would have reached the same decision even in the absence of the protected conduct. It is clear from the incidents credited by the Judge that the termination of Martinez was based on a pattern of disruptive, unprofessional conduct creating an atmosphere of racial strife among staff and management in the office which finally culminated in a written reprimand and the subsequent Notice of Proposal to Remove. The written reprimand referred to three incidents by date and other incidents by reference where Martinez's conduct showed disrespect and undermined the authority of his supervisor. As an example of this type of conduct, the Judge credited the fact in one incident that Martinez, in objecting to a priority assignment, flew into a rage, slammed the file on the desk, yelled at his supervisor so loudly that it was heard clearly several offices away and refused to do more work. In the written reprimand that followed, the supervisor stated specifically:

> I have ignored previous incidents of similar behavior hoping that after my prior requests, your behavior would change. I cannot any longer continue to do so, since this pattern of behavior is affecting the normal functions of this office. Your tone and content of your comments are a personal attack on my functions and the integrity of other supervisors. This conduct of jumping to conclusions, making unfound accusations, and consistently questioning direct supervisory instructions cannot be condoned.

In our view, the pattern of misconduct described in the Notice and credited by the Judge, standing alone, is sufficient to support the Respondent's discharge of Martinez. Unlike the Judge, we do not ascribe any adverse inference to the fact that Martinez's supervisor initially attempted to correct his behavior verbally and not place anything in writing in his record. Only when informal efforts failed and Martinez's conduct became progressively worse did she issue a written reprimand and subsequently participate in the preparation of the Notice of Proposal to Remove. We also do not ascribe any adverse inference to the fact that the Respondent obtained statements concerning Martinez's improper conduct prior to issuing the Notice of Proposal to Remove. To do otherwise would have been irresponsible and inadequate personnel work. We find that a preponderance of the evidence establishes that Respondent, even in the absence of Martinez's protected activity, would have removed him because of the pattern of misconduct described. Accordingly, we conclude that the Respondent by its actions in terminating Martinez did not violate the Statute as alleged in the complaint and we shall order that portion of the complaint be dismissed. See Internal Revenue Service, Washington, D.C. and National Treasury Employees Union, 6 FLRA 96 (1981).

B. Martinez's Grievances as a Basis for Termination in Notice of Proposal to Remove

The complaint also alleged that Respondent independently violated section 7116(a)(1) of the Statute by including as a basis for termination in the Notice of Proposal to Remove the processing of Martinez's grievances. We disagree with the Judge's determination that it is unnecessary to reach this allegation. As we previously found that the filing and active pursuit of these grievances were protected under the Statute, we view the inclusion in the Notice of Proposal to Remove of remarks concerning grievances filed by Martinez as an infringement upon the exercise of Martinez's protected rights under section 7102 of the Statute. See U.S. Department of Interior, Office of the Secretary, U.S. Government Comptroller for the Virgin Islands, 11 FLRA 521 (1983). Accordingly, by including references to Martinez's filing and active pursuit of his grievances as a basis for termination in the Notice of Proposal to Remove, Respondent violated section 7116(a)(1) of the Statute.

VI. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, we have reviewed the rulings of the Judge made at the hearing, find that no prejudicial error was committed, and affirm those rulings. We have considered the Judge's Decision and the entire record, and contrary to the Judge we conclude as found above that the Respondent did not violate the Statute as alleged in the complaint by the termination of Martinez and shall dismiss that portion of the complaint. However, we find that by including Martinez's filing and processing of his grievances as a basis for termination in the Notice of Proposal to Remove, Respondent violated section 7116(a)(1) of the Statute.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the Equal Employment Opportunity Commission shall:

1. Cease and desist from:

(a) Including in the Notice of Proposal to Remove Edgard Martinez dated October 12, 1984, any adverse comment concerning the right to file and process grievances under the contractual grievance procedure.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by the Statute.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute:

(a) Upon request, delete from the Notice of Proposal to Remove Edgard Martinez dated October 12, 1984, any adverse reference to the filing and processing of grievances filed by Martinez under the contractual grievance procedure.

(b) Post at its Baileys Crossroads, Virginia Office, copies of the attached notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Chairman, and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region III, Federal Labor Relations Authority, 1111 18th Street, NW., 7th Floor, P.O. Box 33758, Washington, D.C. 20033-0758, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

It is further ordered that the remaining allegation of the complaint in Case No. 3-CA-50243 pertaining to the discharge of Edgard Martinez is dismissed.

Issued, Washington, D.C., December 29, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

(24 FLRA No. 82)

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT include in the Notice of Proposal to Remove Edgard Martinez dated October 12, 1984, any adverse comment concerning the right to file and process grievances under the contractual grievance procedure.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request, delete from the Notice of Proposal to Remove Edgard Martinez any adverse reference to the filing and processing of grievances filed by Martinez under the contractual grievance procedure.

____
(Agency)

Dated: __________________ By: ______________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region III, whose address is: 1111 18th Street, NW., 7th Floor, P.O. Box 33758, Washington, D.C. 20033-0758 and whose telephone number is: (202) 653-8500.

(24 FLRA No. 82)

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . . :
EQUAL EMPLOYMENT OPPORTUNITY :
COMMISSION :
:
Respondent :
:
and : Case No. 3-CA-50243
:
EDGARD MARTINEZ :
:
Charging Party/Individual :
:
. . . . :

Erica F. Cooper, Esquire
Bruce D. Rosenstein, Esquire
For the General Counsel

Frederick W. Ford, Esquire
Calvin Washington, Esquire
For the Respondent

Before: BURTON S. STERNBURG
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. Section 7101 et seq., and the Rules and Regulations issued thereunder.

Pursuant to an amended charge first filed on March 26, 1985 by Edgard R. Martinez, an individual, a Complaint and Notice of Hearing was issued on June 21, 1985, by the Regional Director for Region III, Federal Labor Relations Authority, Washington, D.C. The Complaint alleges that the Equal Employment Opportunity Commission, (hereinafter called the Respondent or EEOC), violated Sections 7116(a)(1) and (2) of the Federal Service Labor-Management Relations Statute, (hereinafter called the Statute), by discharging Mr. Martinez because of his participation in activities protected by the Statute, namely, filing grievances. It is further alleged that Respondent committed an independent violation of Section 7116(a)(1) by alluding to Mr. Martinez' protected activity as a basis for his removal in the formal "Notice of Proposal to Remove".

A hearing was held in the captioned matter on August 6 and 7, 1985, in Washington, D.C. All parties were afforded the full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. The General Counsel and the Respondent submitted post-hearing briefs on September 23,1985,[1] which have been duly considered.[2]

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions, and recommendations.

Findings of Fact

At all times material herein, the American Federation of Government Employees, AFL-CIO, Council 216 has been the exclusive representative of a unit of Respondent's professional employees, including attorneys. At all times material herein, the Union and Respondent have been parties to a collective-bargaining agreement which includes a negotiated procedure for the processing of grievances. Under that agreement, an employee may process a grievance through the negotiated grievance procedure as an individual and without union representation.

On July 1, 1979, Mr. Martinez was hired as a General Attorney in the Appeals Division of Respondent's Office of Review and Appeals. Mr. Martinez remained in that position, located at Respondent's Baileys Crossroads, Virginia location until November 2, 1984. For two to three weeks prior to his removal, which was effective November 2, 1984, Mr. Martinez' immediate supervisor was Mr. Gary Hozempa. Immediately prior to that, from January 1984 to October 1984, Ms. Hilda Rodriguez held the position of Supervisory Attorney and was Mr. Martinez' immediate supervisor. Ms. Rodriguez, as Supervisory Attorney reported directly to Mr. Robbie Dix, III, Director, Division of Appeals. Mr. Dix, in turn, reported to Ms. Delores Rozzi, Director of the Office of Review and Appeals (ORA).

During the summer of 1984, Mr. Martinez became concerned about changes made by ORA management in the method of performing his work. One such change involved the imposition of clerical duties on attorneys as part of their official duties. Another change concerned attorney access to the office word processing equipment in the preparation of their draft decisions. A third change required attorneys to proofread not only their own work, but work of other attorneys. Other changes affecting Mr. Martinez were the manner of prioritizing case work assigned to attorneys and the fluctuation of case production numbers required of attorneys.

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[1] Respondent on November 1, 1985 moved to file a Supplemental Post-Hearing Brief. In the absence of any objection, the brief has been received and considered.

[2] In the absence of any objection, the General Counsel's Motion to Correct Transcript, is hereby granted.

In response to the above changes, Mr. Martinez filed four grievances under the applicable collective-bargaining agreement. Mr. Martinez filed the first grievance concerning the use of word processing equipment informally with Ms. Rodriguez on July 13, 1984. After no resolution was reached, on July 27, 1984, Mr. Martinez elevated that grievance to the next level to Office Director Rozzi. Ms. Rozzi denied the grievance on August 2, 1984. Thereafter, Mr. Martinez elevated the grievance on August 3, 1984 to the third level with Respondent's Chairman Clarence Thomas. Chairman Thomas denied that grievance on September 27, 1984.

On August 3, 1984, Mr. Martinez filed a second grievance at the first level with Ms. Rodriguez concerning what he considered the imposition of clerical duties on attorneys. Additionally, in the grievance, he sought responses to memoranda written by Mr. Martinez on June 25, 1984 and June 27, 1984 to management requesting specific information on attorney production requirements. Ms. Rodriguez responded on August 10, 1984, denying his grievance. Mr. Martinez again followed the procedure set forth in the collective-bargaining agreement and appealed the denial to Ms. Rozzi on August 16, 1984. Ms. Rozzi denied the grievance on August 23, 1984 which Mr. Martinez promptly raised to the third level with the Chairman on August 24, 1984. The Chairman denied the grievance on September 27, 1984.

Mr. Martinez filed a third grievance at the step one level with Ms. Rodriguez on August 29, 1984. The third grievance concerned a dispute surrounding the assignment of a particular priority case, the imposition of proofreading duties on attorneys, and production requirements as set forth in an August 28, 1984 memorandum from Ms. Rodriguez. After receiving Ms. Rodriguez' first step denial on September 4, 1984, Mr. Martinez elevated the grievance to Ms. Rozzi at the second step on September 10, 1984. Ms. Rozzi did not respond to the grievance at the second step, and thereafter Mr. Martinez elevated the grievance to the Chairman's level. In conjunction with that grievance, Mr. Martinez submitted a memorandum dated September 25, 1984 to the Chairman and all of Respondent's Commissioners addressing his positive contributions to the Commission and suggesting possible ways of improving operations in ORA. Although Mr. Martinez received no response to his September 25, 1984 memorandum, Chairman Thomas denied the grievance on November 30, 1984.

By memorandum dated September 4, 1984, Mr. Martinez requested an adjustment of his productivity requirements. On September 25, 1984, Mr. Martinez filed a first step grievance based on the lack of response to his

September 4, 1984 memorandum. The grievance was denied by Ms. Rodriguez on the same day. Mr. Martinez appealed that denial to Ms. Rozzi who on September 28, 1984 informed Mr. Martinez that in accordance with instructions from Respondent's Labor Relations Office, the appropriate second step grievance level was the Division Director, rather than the Office Director and consequently forwarded the grievance to Robbie Dix, III for response.

A second step grievance meeting was held on October 1, 1984 on the grievance. In attendance were Mr. Martinez, Chief Steward Diane Amos and Mr. Dix. On October 3, 1984, Mr. Dix denied the grievance at the step two level. Mr. Martinez appealed to Ms. Rozzi on October 9, 1984. Ms. Rozzi denied the appeal on October 11, 1984.

On October 12, 1984, Mr. Martinez attended a meeting in Division Director Dix's office, and received a "Notice of Proposal to Remove" him from his position in ORA for unacceptable and unprofessional conduct. Present at that meeting were Mr. Dix, Chief Steward Diane Amos, Mr. Rick Reda, Acting Director of ORA Administration, and Mr. Martinez. After reviewing the Notice, Ms. Amos objected to its contents on the basis that the incidents listed therein were not specific enough to allow Mr. Martinez to adequately respond to the Notice and that the Notice did not conform to the requirements of the collective-bargaining agreement as to the timeliness of the allegations. Ms. Amos asked both Ms. Rodriguez and Mr. Dix for more specifics. Mr. Dix stated that Ms. Amos would have to get any specifics from Office Director Rozzi. Ms. Amos received a memorandum dated October 22, 1984 from Ms. Rozzi denying her request for further clarification of the Notice. Ms. Amos made a formal response to the Notice of Proposal to Remove by letter of October 24, 1984, in which she stated her objections to the form and content of the Notice.

Three days after receiving the Notice of Proposal to Remove, on October 15, 1984, Mr. Martinez received his annual performance appraisal for the period October 1, 1983 to September 30, 1984. Attached to that appraisal was an Individual Development Plan for those areas in which Mr. Martinez had been found to be deficient. The Plan, drafted in accordance with EEOC Order 542, was designed to provide Mr. Martinez with 90 days to improve both the quality of his work and his conduct.

Shortly thereafter on October 26, 1984 at 9:00 p.m., a private process server delivered two documents to Mr. Martinez at his home: A Notice of Removal dated October 26, 1984 and a memorandum from Delores Rozzi directing Mr. Martinez to call his then supervisor Mr. Hozempa to arrange for an inventory of case files and government property, and placing him on administrative leave until the effective date of his removal, November 2, 1984.

Respondent assigned the following reasons for its proposed action.

"1. You have demonstrated a course of conduct which has created an atmosphere of racial strife among the staff and management in the Office of Review and Appeals.

2. You have been disruptive and unprofessional in your conduct with management officials both inside and outside your chain of command, as well as with your co-workers.

3. You have been hostile in your attitude and dealings with management, and your conduct has rendered you ineffective in your relations with the staff and management of the Office of Review and Appeals.

While some of the incidents enumerated below took place more than 60 days ago, they clearly demonstrate a continuous behavioral pattern. The specific instances of unacceptable and unprofessional conduct listed above on which this proposed action to remove you are based are as follows:

REASON - 1. Conduct which has created an atmosphere of racial strife among staff and management of the Office of Review and Appeals.

INCIDENTS - 1 a. The function of the Office of Review and Appeals is quasi-judicial in nature. It requires that its employees maintain the highest standards of conduct, especially since they have a responsibility to maintain an impartial, objective point of view in the work they conduct. Your comments to a former co-worker regarding his promotion to management, that he received this promotion only because he is white, reflect poor judgement on your part, violate those standards, jeopardizes your impartiality, creates the appearance of inefficiency, and adversely affects the operation of this Office. You also told this employee that black employees in the office agreed and stated that his race was the reason for his selection. To create a situation fostering racial strife in any office is clearly improper. To do so in an Office such as Review and Appeals is unacceptable.

1 c. You then encouraged a black employee to file an EEO complaint regarding his non-selection for this same promotion. You stated to this employee that he had a good case. This type of behavior is divisive, and generates racial tension and suspicion, by putting black and white employees against one another. This conduct cannot be permitted to exist in any work place, and is especially unacceptable in this Office.

1 d. You have also stated to your supervisor and to other staff members that white employees have received more difficult case assignments, when you would have no factual data on which to base such comments. Furthermore, in displays of emotional outbursts, you have repeatedly accused the Office management, without any foundation

whatsoever, of discriminating against white males in the daily operation of this Office. In making such unfounded allegations, you have created an atmosphere of racial tension and suspicion.

1 e. The above actions have rendered you totally ineffective in your dealings with supervisors and managers in this Office, as well as with your co-workers. Your behavior has been so disruptive that you have created racial strife in the work place; many of your co-workers do not want to deal with you for fear that anything said will be used to create further strife and disruption.

REASON - 2. Disruptive and unprofessional conduct.

INCIDENT - 2 a. You have demonstrated repeatedly that you are extremely difficult to supervise; you seldom accept assignments or take direction without challenging authority, e.g., your objections at receiving a priority assignment - 05-84-0190. You have also responded to directions to proofread your decisions with the objection that it is not your job, even though this is clearly stated in your performance standards.

2 b. You stated to the Federal Liaison Officer when you learned that he was not with the management team on the Los Angeles trip that he "must be on the shit list, too."

2 c. You made comments to the Director of Compliance and Control Division which were derogatory in nature regarding the promotion of two employees into management.

2 d. After the selection of another Commission employee from another office to a management position in this Office, you called him on at least three occasions, telling him of your grievances, and you alluded to an EEO complaint. There is a strong implication that if he became your supervisor and took any kind of disciplinary action against you, you could allege retaliation. As a result, this employee declined to accept the position, thereby causing undue hardship on this Office. This delayed the filling of this position, and has delayed the implementation of this Office's quality assurance program.

2 e. Management recognizes the right of employees to avail themselves of the grievance process and to bring matters of concern to the appropriate management officials. However, you have clearly abused this process by using this mechanism to create disruptions among employees and management, and creating tension and suspicion. You have used the grievance procedure as a threat and as leverage to attempt to prevent management from performing its legitimate functions and duties. As a result you have further made yourself ineffective in your relations with other employees and management.

REASON - 3. Hostile attitude in your dealings with management.

INCIDENT - 3 a. As referenced above at 2 a., you have demonstrated and extremely hostile attitude toward your supervisor when you have been assigned cases. In a general staff meeting you alleged that you have been assigned almost nothing but merit cases, and accused management of assigning easier cases to the employees in the Review Division. This accusation was completely unfounded. A subsequent review of the cases you have submitted for approval at that time revealed that 77% were procedural cases. Your comments at this meeting only served to create dissension among the staff and hostility towards management.

3 b. You have continuously failed to accept assignments or take direction without requiring the direction to be in writing, with specific instructions on how to deal with cases, thereby requiring an inordinate amount of supervisory time at the expense of other members of the unit (e.g., the Quinones and Dillard cases).

3 c. You have continuously written memos which make the same requests or seek the same guidance, and require excessive amounts of time to respond. This has had an adverse impact on time to review cases. As a result productivity has been impaired, and the overall Office productivity has suffered as well as the individual productivity of other members of the unit, whose cases have not been reviewed (e.g., your constant requests for modifications to your GPAD standards).

3 d. You continuously present a hostile and uncooperative attitude towards management, e.g., during a luncheon with the Office Director, the attorneys in your unit, and your supervisor, you were extremely abusive, loud and disrespectful towards the Director, so much so that your supervisor and other members of the staff later apologized to the Director for your behavior. Furthermore, despite several counselling discussions with your supervisor, your conduct toward management continued to deteriorate to the point that you were then issued a written admonishment. All of your supervisor's efforts to get you to modify and improve your conduct have proven to be unsuccessful.

3 e. Since January, 1984, your supervisor has made repeated attempts to provide you with proper direction and guidance. You have been admonished by her and by your Division Director regarding your conduct and behavior on several occasions. In January, 1984, you were placed on a performance improvement plan, which addressed the quality of your work. Within two months, you were taken off the plan because the quality improved. However, your quality has again deteriorated. It is evident that your hostile attitude and behavior has not only adversely impacted on your relations with the staff and management, but on your own work as well."

With regard to the "incidents" relied upon in the Notice of Removal, Respondent produced numerous witnesses at the hearing who credibly testified without contradiction that "incidents" cited in the Mr. Martinez' Notice of Removal did in fact occur.[3]

With respect to the remarks made to various employees and/or management representatives concerning promotions and work assignments based on racial preference, the record reveals that such remarks were made in private conversations with the particular individuals involved.

The record further reveals that although Respondent was well aware of Mr. Martinez' objectionable conduct which occurred during the period of April-September 1984, no formal discipline of any kind was imposed upon Mr. Martinez until September 10, 1984, when he received a Formal Written Admonishment from his immediate supervisor, Hilda Rodriguez for insubordinate conduct in connection with his handling of a priority case assignment.[4] Although Ms. Rodriguez testified that she had counseled Mr. Martinez concerning his attitude, etc., upon further questioning it was disclosed that at most she had indicated her displeasure at his attitude and actions on a number of occasions when he displayed what she considered unacceptable behavior. No notations of her displeasure were ever entered in Mr. Martinez' personnel file.

With respect to incident 2 e in the Notice of Removal, wherein reference is made to Mr. Martinez' abuse of the grievance process, both Ms. Rodriguez and Ms. Rozzi similarly testified that Mr. Martinez was never satisfied with merely filing a grievance and awaiting Respondent's action thereon. Rather Mr. Martinez continued to demand information and submit numerous memoranda necessitating interim answers on the pending grievances which occupied Ms. Rodriguez' work time and prevented her from processing the cases submitted to her for approval.

Additionally, Ms. Rozzi testified that Mr. Martinez abused the grievance process by informing a potential supervisor, Michael Baldonado, who was occupying another position with EEOC at the time about his pending grievances.[5] Mr. Baldonado, who had been a former co-workers of Mr.

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[3] Michael Baldonado, Hilda Rodriguez, Robbie Dix, Dolores Rozzi, Gary Hozempa, C. Lloyd Buddo, Roscoe Elkins, Ronald Holmes and Josephine Trevathan.

[4] The assignment of priority cases was the subject matter of Mr. Martinez' August 29, 1984 grievance.

[5] According to Ms. Rozzi, Mr. Martinez' action with respect to Mr. Baldonado was like "frosting on the cake" and considering Mr. Martinez' past indiscretions, she decided it was time to remove him.

Martinez, subsequently declined the position. Mr. Baldonado testified that he was uncomfortable with the information because he felt that knowledge of the grievances could be imputed to him if he became a supervisor and thereby inhibit him in his dealings with the employees under his supervision. Mr. Baldonado further testified that although he was uncomfortable with the information imparted to him by Mr. Martinez, it was not the reason that he subsequently refused to accept the supervisory position. Thus, he pointed out that the position was that of an acting supervisor and there was no guarantee that he would ultimately be made a permanent supervisor.

The record further reveals that Mr. Martinez and Ms. Rodriguez were both of Puerto Rican ancestry and had been co-workers prior to Ms. Rodriguez' elevation to a supervisory position. Because of their ancestry and former association their relationship appears to have been much less formal that which usually exists between a supervisor and a subordinate.

Discussion and Conclusions

The General Counsel takes the position that the sole reason for Mr. Martinez' discharge was his participation in activities protected by the Statute, namely the filing of grievances under the negotiated grievance procedure. In such circumstances the General Counsel urges that the undersigned find that the Respondent violated Sections 7116(a)(1) and (2) of the Statute and order Mr. Martinez' reinstatement with back pay. Additionally, the General Counsel contends that the Respondent committed an independent violation of Section 7116(a)(1) of the Statute by including a reference to Mr. Martinez' alleged abuse of the grievance procedure in the "Proposed Notice of Removal".

The Respondent, on the other hand, takes the position that it did not violate the Statute. According to the Respondent inasmuch as Mr. Martinez abused the grievance process his activities in such respect did not fall within the protection of the Statute. Further, Respondent, citing the Authority's decision in IRS, Washington, D.C., 6 FLRA No. 23, takes the position that in any event Mr. Martinez would have been discharged for reasons other than his participation in activities protected by the Statute, i.e., insubordination, causing racial tension, etc.

Contrary to the contention of Respondent, I cannot find that Mr. Martinez' actions in actively pursuing his grievances by seeking information and answers to questions relative thereto somehow removed the grievances from the ambit of protected activity. It appears that Respondent would only allow a grievant the protection of the Statute if he merely filed a grievance and then sat back and passively awaited Respondent's action thereon.

Inasmuch as Respondent has failed to establish any other grounds for disqualification of Mr. Martinez' grievance activity from the protection of the Statute, I cannot find as urged by the Respondent that Mr. Martinez abused the grievance process. Rather I find that his actions in actively pursuing his grievances were protected by the Act.[6]

In view of this conclusion and since Mr. Martinez' protected activity played a part in his discharge, it must now be decided, in accordance with the Authority's decision in IRS, Washington, supra, whether Mr. Martinez would have been discharged in any event for reasons unrelated to his participation in activities protected by the Act. Respondent, of course, takes the position that Mr. Martinez would have been discharged for reasons other than his protected activities, namely causing racial tension, insubordination, etc.

In this context the record establishes that the incidents cited in the "Notice of Proposal to Remove" did in fact occur. However, it is not the existence of grounds for removal which is the test, rather the test appears to be whether such grounds for discharge would have been utilized by Respondent in the absence of the employee's participation in activities protected by the Statute.

The record further establishes that although the supervisory hierarchy was well aware of such incidents, no written notations were ever entered into Mr. Martinez' personnel file. In fact other than exhibiting displeasure with Mr. Martinez' actions, no warnings or other admonishments were given to Mr. Martinez.

To the extent that Mr. Martinez is charged with inciting racial tensions, the participants in such conversations testified that they were not particularly upset with Mr. Martinez' actions, and appeared to accept such actions as an every day occurrence when dealing with Mr. Martinez.

Further, with respect to the cited incidents involving the relationship between Ms. Rodriguez and Mr. Martinez and his daily complaints or comments to her, it should be noted that due to the fact that they were both of Puerto Rican ancestry and former co-workers Ms. Rodriguez appears to have allowed Mr. Martinez greater latitude than normally exists between a supervisor and an employee.

Given the above, I am convinced that but for Mr. Martinez' participation in protected activities, namely filing and actively pursuing four grievances under the negotiated grievance procedure, Respondent would not have discharged Mr. Martinez. It was only after Mr. Martinez filed his grievances and actively pursued same, that Respondent determined to discharge him. To this end it approached the various employees who were involved in the cited incidents and obtained statements concerning Mr. Martinez' alleged unacceptable activities and then proceeded to discharge him. Cf. JMC Transport, Inc. v. NLRB, F.2d , Case Nos. 84-5960 and 84-6060, (Nov. 12, 1985, 6th Cir.); DLR No. 223, Nov. 19, 1985.

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[6] The fact that he may have told a prospective supervisor about his pending grievances does not alter this conclusion.

Having concluded that Mr. Martinez would not have been discharged but for his participation in activities protected by the Statute, I hereby recommend that the Authority issue the following order designed to effectuate the purposes and policies of the Statute.[7]

ORDER

Pursuant to Section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and Section 7118 of the Statute, it is hereby ordered that the Equal Employment Opportunity Commission shall:

1. Cease and desist from:

   (a) Terminating, and other discriminating against, employees because they have engaged in activities protected by the Federal Service Labor-Management Relations Statute, namely, filing and processing grievances under the contractual grievance procedure.

   (b) In any like to related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by the Statute.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute:

   (a) Offer Edgard Martinez immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole, consistent with applicable laws and regulations, for any loss of income he may have suffered by reason of his unlawful termination by paying to him a sum of money equal to the amount he would have earned or received from the date of his termination to the effective date of the offer of reinstatement, less any amount earned through other employment during the above-noted period.

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[7] Having found that Respondent discharged Mr. Martinez solely because of his participation in activities protected by the Statute, I need not, and do not, reach the second allegation of the complaint, i.e., whether Respondent committed an independent 7116(a)(1) violation of the Statute by alluding to Mr. Martinez' protected activity in the "Notice of Proposal to Remove".

(b) Post at its Baileys Crossroads, Virginia Office, copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director of the Office of Review and Appeals and shall be posted and maintained by her for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director, shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region III, Federal Labor Relations Authority, 1111 18th Street, NW., 7th Floor, P.O. Box 33758, Washington, D.C. 20033-0758, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

BURTON S. STERNBURG
Administrative Law Judge

Dated: November 20, 1985
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT terminate, or otherwise discriminate against, our employees because they have engaged in activities protected by the Federal Service Labor-Management Relations Statute, namely, filing or processing grievances under the contractual grievance procedure.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL offer Edgard Martinez immediate and full reinstatement of his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole, consistent with applicable laws and regulations, for any loss of income he may have suffered by reason of his unlawful termination by paying to him a sum of money equal to the amount he would have earned or received from the date of his termination to the effective date of the offer of reinstatement, less any amount earned through other employment during the above-noted period.

____
(Agency or Activity)

Dated: ____________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region III, whose address is: 1111 18th Street, NW., 7th Floor, P.O. Box 33758, Washington, D.C. 20033-0758 and whose telephone number is: (202) 653-8500.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS, AIR FORCE LOGISTICS
COMMAND, WRIGHT-PATTERSON AIR FORCE
BASE, OHIO

Respondent

and Case No. 5-CA-60110

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, COUNCIL 214, AFL-CIO

Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety. Thereafter, the General Counsel filed exceptions to the Judge's Decision and a supporting brief.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's decision, the exceptions to that Decision, and the entire record, the Authority hereby adopts the Judge's findings, conclusions, and recommended Order that the complaint be dismissed.*/

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*/ While we agree with the Judge that, under the circumstances, utilization of the grievance procedure does not constitute an unfair labor practice, we also note that we specifically do not decide whether a course of conduct might become so egregious that further resort to the grievance procedure over the same issue might be improper.

ORDER

The complaint in Case No. 5-CA-60110 is dismissed.

Issued, Washington, D.C., December 29, 1986.

J. L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS, AIR FORCE
LOGISTICS COMMAND, WRIGHT-
PATTERSON AIR FORCE BASE, OHIO.

Respondent

and   Case No.: 5-CA-60110

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, COUNCIL
214, AFL-CIO

Charging Party

. . . .

Major Steven E. Sherwood
For the Respondent

Mr. Paul Palacio
Ms. Julia A. Collier
For the Charging Party

Judith A. Ramey, Esquire
For the General Counsel

Before: William B. Devaney
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq.,[1] and the

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[1] For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the statutory reference, e.g., Section 7116(a)(5) will be referred to, simply, as "§ 16(a)(5)."

Final Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns whether Respondent committed an unfair labor practice, in violation of §§ 16(a)(1) and (5) of the Statute, by filing a grievance. At the conclusion of the General Counsel's case, I stated that I intended to grant Respondent's motion to dismiss; but, since a written decision was required, General Counsel and the Charging Party were afforded the opportunity to submit briefs, which would be carefully considered; but unless persuaded that my conclusion was incorrect my decision would be that Respondent's motion to dismiss was granted. General Counsel has filed a brief opposing the granting of Respondent's motion to dismiss, timely mailed on April 15, 1986, and received on April 21, 1986, and Respondent has filed a brief in support of its motion to dismiss, timely mailed on April 14, 1986, and received on April 18, 1986, which have been carefully considered.

This case was initiated by a charge filed on January 27, 1986 (G.C. Exh. 1(a)), which alleged violation of §§ 16(a)(1) and (8) of the Statute; and a First Amended Charge, filed on February 26, 1986 (G.C. Exh. 1(c)), which alleged violation of §§ 16(a)(1) and (5) of the Statute. The Complaint and Notice of Hearing (G.C. Exh. 1(e)) issued on February 28, 1986, and fixed the date of hearing as April 2, 1986, pursuant to which a hearing was duly held in Dayton, Ohio, on April 2, 1986, before the undersigned.

Findings

1. American Federation of Government Employees, Council 214, AFL-CIO (hereinafter referred to as Council 214) represents a consolidated unit of about 75,000 civilian employees of Respondent at eight separate locations across the country. One of these locations is the Sacramento Air Logistics Center at McClellan Air Force Base, California. A local Union at McClellan, Local 1875 (hereinafter referred to as "Local 1875"), represents McClellan employees as agent of Council 214. Similarly, Local Unions represent bargaining unit employees at the other seven of Respondent's facilities. The parties are governed by a Master Labor Agreement (MLA; Jt. Exh. 1) and, at McClellan also by a local supplement (Jt. Exh. 2).

2. Council 214 had attempted, prior to December, 1983, to negotiate an agreement with Respondent whereby multiple grievances under the MLA could be combined for arbitration. Respondent had objected to such a procedure and had refused

to agree to any provision specifically permitting the combining of grievances for arbitration.

3. On July 11, October 16 and November 18, 1984, a hearing was held before Arbitrator M. K. Warns who issued her decision and award on January 10, 1985 (erroneously dated "January 10, 1984") (Jt. Exh. 6). Arbitrator Warns in her decision first stated, in relevant part:

> ". . . By mutual agreement, the parties submitted two issues to this Arbitrator.
>
> "Procedural Issue: The Union formulates the procedural issue as follows: 'Can the Union present a grievance which contains two issues both of which relate to official time in a single arbitration hearing?
>
> "The Employer states the issue as a matter of the 'permissibility of joining two or more separate incidents into one arbitration proceeding, regardless of whether those incidents are labeled as separate issues under one grievance, or as separate grievances.'" (Jt. Exh. 6, p. 2).

Thereafter, Arbitrator Warns stated,

> "The Arbitrator determines the issues before her to be:
>
> > "1. Whether or not it is a violation of the MLA or past practice between the parties for multiple grievances, multiple incidents, or multiple issues to be presented in one hearing to one arbitrator?
> >
> > "2. Whether or not the MLA was violated, specifically Section 4.06(2) and (19), when the Employer failed to grant official time to Union representatives for the preparation of post hearing briefs in arbitration? If so, what should the remedy be?" (Jt. Exh. 6, p. 2).

4. In her decision, the Arbitrator noted, inter alia that:

> "The Union argues that they are not attempting to join unrelated issues since the letter of December 2, 1983, filed an institutional grievance over the broad issue of the interpretation of the official time provisions for union representatives. The incidents named in the grievance represent two situations involving the same contractual issue, that of use of official time. By definition, grievances filed at the command level would involve occurrences at more than one activity. . . ." (Jt. Exh. 6, p. 4)
>
> . . .
>
> "There have been according to the testimony only three arbitrations at the command level. Three occurrences are hardly sufficient to support a conclusion of a past practice. . . ." (Jt. Exh. 6, p. 5)
>
> . . .
>
> "In summary:
> "1. There is no express language in the MLA prohibiting or limiting the number of grievances, incidents, or issues which can be presented to a single arbitrator in one hearing.
>
> "2. There has been no mutually agreed upon, consistent past practice which would lead to an interpretation that joinder is not permissible.
>
> "3. The parties discussed joinder during negotiations and no specific language was forthcoming in the MLA limiting joinder either as to grievances, or issues.
>
> "4. The language of Section 7.06 as indicated supra supports an interpretation that more than one issue

> may be heard by one arbitrator at a single hearing.
>
> "5. Testimony by Management establishes that more than one grievance may be heard at one hearing by one arbitrator.
>
> "6. The inevitable conclusion, consistent with arbitral precedent generally, the language of the MLA, and the evidence and testimony before me, is that more than one grievance, incident, or issue may be heard by one arbitrator at a single hearing.
>
> "AWARD
>
> "The first issue is resolved in favor of the Union, to wit, that multiple issues and multiple grievances in any combination may be presented to one arbitrator in a single hearing.
>
> "It is not a violation of the MLA or past practice for multiple grievances, or multiple issues, in any combination to be presented to a single arbitrator at a single hearing." (Jt. Exh. 6, pp.7-8).

5. On December 23, 1985, McClellan AFB filed an employer grievance at the activity level, pursuant to MLA Article 6.08 (Jt. Exh. 7). The employer grievance stated, in part, as follows:

> "1. . . . The subject of this grievance is the unilateral action of AFGE Local 1857 in combining separate grievances for arbitration. Further, these actions were done not only without agreement by management to do so, but against management's objection.
>
> "2. We contend that neither the Union nor Management has the authority to unilaterally combine cases for arbitration. There is no such authority granted by the MLA. However, there is a well established past practice at McClellan Air Force Base prior to the

> current MLA and since the current MLA became effective that either party may request the other to allow combining of cases under the particular circumstances of the particular cases as independently and individually determined by the parties to be in their best interest. . . ." (Jt. Exh. 7, p. 1).

6. Mr. John V. Salas, President of Local 1857, denied the grievance by letter dated March 7, 1986 (Jt. Exh. 8). The charge was filed on January 27, 1986; the First Amended charge was filed on February 26, 1986; and the Complaint issued on February 28, 1986, all prior to Mr. Salas' response to the grievance.

Conclusions

Executive Order 11491 provided that,

> "(a) An agreement between an agency and a labor organization shall provide a procedure . . . for the consideration of grievances. . . ." (E.O. 11491, Sec. 13(a))
>
> "(b) A negotiated procedure may provide for the arbitration of grievances. . . ." (E.O. 11491, Sec. 13(b))

The Statute made the direction more explicit:

> "7121. Grievance procedures.
>
> "(a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsection (d) and (e) of this section, the procedures shall be the exclusive procedures for resolving grievances which fall within its coverage.
>
> . . .

> "(b) Any negotiated grievance procedure referred to in subsection (a) of this section shall -
>
> . . .
>
> "(3) include procedures that -
>
> . . .
>
> "(C) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency." (5 U.S.C. § 7121(a) and (b)).

Under both the Executive Order and the Statute extreme care has been taken to insure and protect the right to file and process grievances. It is altogether extraordinary to suggest that utilization of the very right conferred by Congress, namely to use the negotiated grievance procedure which Congress has specifically mandated, ". . . shall be the exclusive procedure for resolving grievances which fall within its coverage," constitutes an unfair labor practice.

Conceivably, a course of conduct might become so egregious that further resort to the grievance procedure over the same issue might be improper, a question I specifically do not decide; but assuredly not on the basis of a single prior arbitrator's decision especially not on the basis of an arbitration decision which neither decided, nor purported to decide, the right to combine grievances for arbitration at an activity level. To the contrary, the grievance before Arbitrator Warns was a command level grievance and she stated that there had been "only three arbitrations at the command level. Three occurances are hardly sufficient to support a conclusion of a past practice," and she then relied heavily on her finding that "There has been no . . . consistent past practice which would lead to an interpretation that joinder is not permissible" for her decision.

But more basic, arbitrators are not bound by stare decisis. An arbitrator may follow arbitral precedent but is under no compunction to do so and examples are legion where arbitrators have departed from arbitral precedent involving the same issues. Certainly, Respondent has every right to engage in elucidative litigation, at the least at the activity level, to test the parameters of consolidation of grievances for arbitration.

The decision of Arbitrator Warns created no duty to bargain, but her award constituted, merely, the resolution of the grievance before her. Indeed, Article 7, Section 7.06a of the MLR specifically provides that, "The arbitrator's authority is limited to deciding only the issue or issues considered in the formal grievance. . . ." (Jt. Exh. 1, Article 7, Section 7.06a.) Nor did the parties engage, or seek to engage, in collective bargaining on the issue of consolidation of grievances for arbitration following Arbitrator Warns decision. Consequently, I find General Counsel's assertions concerning good faith bargaining wholly immaterial.

Accordingly, as General Counsel failed to establish even a prima facie showing of a violation, Respondent's Motion to Dismiss is granted and it is recommended that the Authority adopt the following:

ORDER

The Complaint in Case No. 5-CA-60110 be, and the same is hereby, dismissed.

William B. Devaney
WILLIAM B. DEVANEY
Administrative Law Judge

Dated: May 5, 1986
Washington, D.C.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

UNITED STATES DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT, REGION VI
AND UNITED STATES DEPARTMENT OF
HOUSING AND URBAN DEVELOPMENT
REGION VI, SAN ANTONIO AREA OFFICE

Respondent

and

Case No. 6-CA-20311

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3320

Charging Party

DECISION AND ORDER ON MOTION FOR PAYMENT OF ATTORNEY FEES

I. Statement of the Case

This matter is before the Authority on exceptions filed by the Charging Party (the Union) to the attached Decision of the Administrative Law Judge. A response was filed by the General Counsel and an opposition was filed by the Respondent. The issue concerns a Motion For Payment Of Attorney Fees filed by Steven M. Angel, Counsel for the Union, in connection with a previously decided unfair labor practice case. The motion was filed under the Back Pay Act, 5 U.S.C. § 5596.

II. Background and Judge's Decision

In the underlying unfair labor practice proceeding, it was alleged that the Respondent had initiated and taken disciplinary action against an employee because of his membership in and activities on behalf of the Union, in violation of section 7116(a)(1) and (2) of the Federal Service Labor-Management Relations Statute (the Statute). The employee, Phillip Aguirri, had posted letters on the Union's bulletin board, in his capacity as Union President. The letters contained statements which accused certain of the Respondent's management officials of lying at a previous unfair labor practice hearing. Based on this conduct, Aguirri was suspended for five work days.

In his Decision involving the suspension, the Judge found that Aguirri was acting for the Union when he posted the letters and that, as such, Aguirri's actions were protected from discipline and threats of discipline unless it were shown that he had engaged in flagrant misconduct. The Judge further found that under the facts of the case and relevant precedent, the actions did not constitute flagrant misconduct. He thus concluded that the Respondent's action in threatening discipline against Aguirri and in suspending him from employment violated section 7116(a)(1) and (2) of the Statute as alleged in the complaint. To remedy the violation, he recommended that the Respondent rescind the suspension and make Aguirri whole for any losses in pay he may have suffered as a result of the suspension.

No exceptions were filed to this Decision and the Authority issued an Order which adopted the Judge's Decision and recommended Order as the resolution of the case. FLRA Administrative Law Judge Decisions Report No. 36 (April 12, 1984).

In the attached Decision on the motion for attorney fees the Judge found that the Back Pay Act authorized an award of attorney fees in unfair labor practice proceedings but that the motion for fees in this case did not meet the "interest of justice" standard of 5 U.S.C. § 7701(g). Therefore, without considering what amount of attorney fees would be reasonable, he recommended that the motion be denied.

III. Position of the Parties

Counsel for the Union argues that the Judge erred in concluding that an award of attorney fees was not warranted in the interest of justice and in denying its motion for fees. The Respondent and the General Counsel support the Judge's conclusion.

IV. Analysis and Conclusions

In International Brotherhood of Electrical Workers and United States Army Support Command, Hawaii, 14 FLRA 680, 683-84 (1984), cited by the Judge, and Naval Air Development Center, Department of the Navy and American Federation of Government Employees, Local 1928, AFL-CIO, 21 FLRA No. 25 (1986), the Authority detailed the considerations which apply to awards of attorney fees under the Back Pay Act, 5 U.S.C.

§ 5596. 1/ As further discussed in those decisions, the Back Pay Act authorizes awards of attorney fees against the Government where an appropriate authority has found: (1) that an employee has been affected by an unwarranted or unjustified personnel action which results in the withdrawal or reduction in pay, allowances, or differentials; and (2) that this action be remedied by an award of backpay.

A. Unwarranted or unjustified personnel action and backpay award

As decided by the Judge, the motion for attorney fees in this case meets these threshold requirements. The effect of the Authority's final Order, which adopted the Judge's Decision in the underlying case, was to determine that Aguirri had been affected by an unjustified or unwarranted personnel action which resulted in the withdrawal of pay. Further, the Authority's Order corrected this action with a remedy which included an award of backpay.

B. The requirements of 5 U.S.C. § 7701(g)

If a motion meets the unwarranted personnel action and backpay requirements, section 5596(b)(1)(A)(ii) of the Back Pay Act provides that fee requests must be judged under the standards for awarding attorney fees provided in 5 U.S.C. § 7701(g).

1. Incurrence of attorney fees: It must be shown that an attorney-client relationship existed and that the attorney rendered legal services on behalf of the employee. O'Donnell v. Department of Interior, 2 MSPB 604 (1980). Because the record shows that an obligation to pay attorney fees was incurred by Aguirri both as an individual and as Union President and that Counsel rendered legal services in the case, we conclude in agreement with the Judge, that this requirement has been met.

2. Prevailing party: The employee must be a prevailing party in the proceeding for which an award is sought. This requirement is met if the employee has obtained

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1/ Those decisions specifically concerned attorney fee awards in connection with arbitration proceedings. The same basic considerations apply, with certain adjustments discussed below, to awards in unfair labor practice cases under the Back Pay Act.

all or a significant part of the relief which was sought. Sterner v. Department of the Army, 711 F.2d 1563, 1566-67 (Fed. Cir. 1983).

The Judge found that the General Counsel had prevailed because it had prosecuted the case and represented the public interest and that the Union had prevailed because it had acted to protect its institutional interests. Since Aguirri received the relief he sought, the Judge decided that he should be considered as having been a prevailing party. We agree with the Judge's reasoning and conclusion.

We further agree with his conclusion that the arguments concerning the General Counsel's primary role in prosecuting the case should be considered in relation to the reasonableness of the amount of the award, and not in relation to whether the employee was a prevailing party.

3. Interest of justice: If an obligation to pay fees has been incurred and the employee is a prevailing party, an award can be made if it is warranted in the interest of justice. Applying the guidelines established by the Merit Systems Protection Board (MSPB) in Allen v. U.S. Postal Service, 2 MSPB 582, 593 (1980), the Judge determined that the requested award was not warranted in the interest of justice. We disagree.

After the Judge's recommended denial of attorney fees in this case, the United States Circuit Court of Appeals for the Federal Circuit 2/ clarified the application of the interest of justice standard enunciated in Allen. Yorkshire v. MSPB, 746 F.2d 1454 (Fed. Cir. 1984); Thompson v. MSPB, 772 F.2d 879 (Fed. Cir. 1985); Boese v. Department of the Air Force, 784 F.2d 388 (Fed. Cir. 1986); Van Fossen v. MSPB, 788 F.2d 748 (Fed. Cir. 1986).

The court explained that a decision on whether an agency's personnel action was "clearly without merit" or was "wholly unfounded," or whether the employee was "substantially innocent," should be based on the result of the appeal, not on the evidence and information which was available to the agency prior to the hearing. Pointing out that the purpose of providing for awards of fees is not punitive, but is intended to reduce employees' costs in

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2/ The Federal Circuit is the court vested with exclusive review of decisions of the Merit Systems Protection Board. 5 U.S.C. § 7703(b)(1).

defending against unsubstantiated agency actions, the court explained that an award of fees is warranted in the interest of justice if on appeal any of these elements is present. See Yorkshire and Van Fossen. The court has also explained that this determination, based on the result of the appeal, should be separate from and not qualified by, determinations regarding the agency's motivation when it initiated the action. See Boese. The court has specifically found that "all 'factually close' cases do not automatically fall in the class in which fees are not available in the interest of justice." See Thompson v. MSPB, 772 F.2d at 881.

Applying the Federal Circuit's approach, we conclude that the result in the underlying unfair labor practice proceeding shows that an award of attorney fees is warranted in the interest of justice. The Respondent suspended Aguirri because he had engaged in certain conduct while acting for the Union. This action was found to be a violation of section 7116(a)(1) and (2) of the Statute. The violations related to a disciplinary action against an individual who was the Union President.

The Judge found that Aguirri had posted the statements with a good faith belief that they were true. He rejected the Respondent's assertion that they were posted with knowledge that they were false or in reckless disregard for the truth. He further found that the statements represented a legitimate concern of a union representative regarding labor relations matters and that Aguirri had posted the statements in accordance with the Union's established practice of keeping employees informed of the Union's activities. It is also significant that Counsel for Aguirri and the Union brought each of these matters to Respondent's attention in his responses to the charges leveled against his client. The Judge further detailed the existing legal precedent which the Judge ultimately found to warrant a finding that Aguirri was engaging in protected activity.

From all this we conclude that Aguirri was "substantially innocent" and that the Respondent's actions in threatening discipline against Aguirri and in suspending him from employment for five days were "clearly without merit," "wholly unfounded," and violative of law. Based on the result, we conclude that an award of attorney fees has been shown to be warranted in the interest of justice under the Allen standards as interpreted by the Federal Circuit. 3/

4. Reasonableness of the amount of the award: The Judge did not consider whether the amount of the award was reasonable, as he concluded that an award was not warranted in the interest of justice. We have considered whether the matter should be remanded to the Judge for such findings and decided that this is not necessary. Counsel for Aguirri and the Union has provided the documentation necessary to support his motion for attorney fees and all parties have had the opportunity to address any arguments concerning the motion.

Turning to the specifics of the instant motion, Counsel billed four (4) hours for work done in representing the employee in Respondent's disciplinary proceedings. Because these proceedings arose from and concerned the same facts which were at issue in the subsequent Authority proceedings, and an award has been determined to be warranted for the latter, we conclude that the award should cover this work. The billing of these four hours is reasonable. See Young v. Department of the Air Force, 86 FMSR 5007 (1986) and Brown v. U.S. Coast Guard, 85 FMSR 5362 (1985).

Counsel billed one-quarter (1/4) hour for the drafting and submission of the unfair labor practice charge which gave rise to the General Counsel's complaint in this case. Although the services of an attorney are not necessary for this function, charges which are drafted and submitted with such assistance often are of value to the General Counsel in preparing and conducting an investigation. The billing of this one-quarter hour is reasonable. See Wells v. Schweiker, 12 MSPB 329, 330 (1982) (fees awarded for work done in bringing necessary underlying facts to the attention of the MSPB Special Counsel).

Counsel billed (15) hours for work in preparing for the hearing before the Judge, counsel's participation at the hearing, and the submission of a post-hearing brief. The Authority's Regulations provide that a party to an unfair labor practice case has the right to appear at any hearing with counsel, to examine and cross-examine witnesses, and to introduce evidence, all subject to a decision by the Judge that such participation should be limited. 5 CFR § 2423.15.

3/ In so concluding, we find it unnecessary to address whether a prohibited personnel practice as defined in 5 U.S.C. § 2302(b) occurred.

They also provide that a party has the right to make an oral argument before the Judge at the end of the hearing and to file a brief on the issues raised for the Judge's consideration in deciding the case. 5 CFR §§ 2423.24, 2423.25.

Since these aspects of participation are entitlements under the Authority's Rules and Regulations, we will not second-guess a party's decision to seek legal representation for such purposes in an unfair labor practice proceeding. Nor will we conclude, absent a specific showing, that participation by outside counsel was either duplicative of, or failed to make a substantial contribution to, the General Counsel's efforts in prosecuting the case. Cf. Donovan v. CSEA Local Union 1000, 784 F.2d 98, 106 (2d Cir. 1986), cert. denied sub nom. CSEA Local Union 1000, American Federation of State, County and Municipal Employees, AFL-CIO v. Brock, __U.S.__, 107 S.Ct. 74 (1986); Ribel v. Eastern Associated Coal Corp., 63 Admin. L. 2d (P&F) 145, 147, 149-50 (FMSHRC 1985), appeal filed Nos. 86-3832, 86-3833 (4th Cir. 1986). Although such fee requests must be carefully scrutinized, the mere presence of an administrative prosecutor does not per se preclude an award for contributions to the proceedings made by outside counsel. See Donovan v. CSEA Local Union 1000, supra. The specific inclusion of a fee award provision for unfair labor practice proceedings in the Back Pay Act further negates such an interpretation.

In the instant case the record does not provide any basis for finding that the efforts of Counsel for Aguirri and the Union were either duplicative of or failed to make a substantial contribution to the prosecution of the case. To the contrary, Counsel participated actively and pursued pertinent lines of questioning of witnesses different from those of Counsel for the General Counsel. The Authority is cognizant of the sometimes differing roles and interests of the General Counsel and charging parties or individuals on behalf of whom a charge is filed. This distinction in large part provides the basis for the right of a charging party to participate and be represented by counsel. The billing of 15 hours for services relating to preparation and participation at the hearing is granted.

Counsel billed five (5) hours for investigation of the unfair labor practice. Although the investigation of an unfair labor practice charge and a decision on whether a complaint should issue based on the investigation are responsibilities of the General Counsel, like work performed during the Respondent's disciplinary proceedings, the ultimate success of Aguirri's case demonstrates that the investigation materially advanced that effort. There is no showing that the five hours spent in assisting the investigation were duplicative of, or failed to make a substantial contribution to the General Counsel's efforts.

Counsel billed two (2) hours for the preparation of the papers in support of the motion for attorney fees. This is customarily considered appropriate for inclusion as part of an award of fees. The billing of this two hours is granted.

The total number of hours of service thus approved is 26.25 hours. Since these fees are to be paid to the attorney, Steven M. Angel, and not to the Union's treasury for reimbursement to the Union for costs of services it provided out of its funds, a market rate rather than a "salary-plus-overhead" or "cost-plus" rate is appropriate. See National Treasury Employees Union v. U.S. Department of Treasury, 656 F.2d 848, 850 (D.C. Cir. 1981); Wells v. Schweiker, 12 MSPB 329, 331-32 (1982).

The requested billing rate is $90.00 per hour. Counsel's affidavit states, without dispute by Respondent or the General Counsel, that this represents his customary billing rate and reflects a rate awarded him in other personnel cases. The requested billing rate is not unreasonable on its face nor does it greatly exceed the rate permitted under the Equal Access to Justice Act. 5 CFR § 2430.4. We will allow a billing rate of $90.00 per hour in this case. The total number of allowed hours (26.25) at $90.00 per hour totals $2372.50 for services of counsel. See Naval Air Development Center, Department of the Navy and American Federation of Government Employees, Local 1928, AFL-CIO, 21 FLRA No. 25 (1986).

Counsel also requested $82.35 for the cost of the trial transcript. This request must be denied because the transcript constitutes a "taxable cost" under 28 U.S.C. § 1920(2). There is no statutory right of recovery for stenographic fees for transcripts in an administrative proceeding under the Civil Service Reform Act of 1978. Bennett v. Department of the Navy, 699 F.2d 1140 (Fed. Cir. 1983).

ORDER

Pursuant to the Back Pay Act, 5 U.S.C. § 5596, and the Civil Service Reform Act of 1978, 5 U.S.C. § 7701(g), the Authority grants an award in the amount of $2372.50, and orders the United States Department of Housing and Urban

Development, Region VI, and United States Department of Housing and Urban Development, Region VI, San Antonio Area Office to pay that amount to Attorney Steven M. Angel.

Issued, Washington, D.C., December 29, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, DC 20424

. . . .

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, REGION VI, AND UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, REGION VI, SAN ANTONIO AREA OFFICE

Respondent

and

Case No. 6-CA-20311

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 3320

Charging Party

. . . .

Donald Grant, Esquire
For the Respondent

Steven M. Angel, Esquire
For the Charging Party

Susan E. Jelen, Esquire
For the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION AND ORDER DENYING MOTION FOR PAYMENT OF ATTORNEY FEES

This proceeding under the Back Pay Act, 5 U.S.C. § 5596, and 5 C.F.R. § 550.801 (1984) et seq. of the Office of Personnel Management's (OPM's) Rules and Regulations was instituted by the filing of a Motion for Payment of Attorney's Fees by Steven M. Angel, attorney for the Charging Party, on January 31, 1984. On July 6, 1984, the Authority remanded the motion for appropriate disposition.

Pursuant to section 550.806(b) of OPM's Rules and Regulations, the Respondent was provided an opportunity to respond to the motion. By order dated July 13, 1984 all counsel including counsel for the General Counsel, were asked to respond to certain issues. All of the parties filed an appropriate response, and counsel for Charging Party filed a further response to the General Counsel's submission. No party requested an evidentiary hearing, and such hearing appears unnecessary based on the various submissions. Upon consideration of the entire record, I make the following findings and conclusions.

Findings and Conclusions

On November 10, 1983 the undersigned Administrative Law Judge issued a decision in the above-entitled proceeding finding that Respondent had violated sections 7116(a)(1) and (2) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101 et seq. (the Statute) by issuing a notice and decision to suspend Phillip Aguirri. Aguirri, the president of Local 3320, was suspended for posting on the Union bulletin board three letters accusing management officials of lying under oath during an unfair labor practice hearing. The decision found, inter alia, that there was no showing that Aguirri's statements were disloyal toward the agency's services or operations, likely to produce misconduct or disrupt discipline, or that the statements were not made by Aguirri with knowledge of their falsity or with reckless disregard of whether they were true or false. It was concluded in the circumstances of the case that the statements for which Aguirri was suspended for posting represented the legitimate concern of a union representative regarding labor relations matters and did not represent the kind of flagrant conduct which was beyond the ambit of protected activity. It was recommended that Respondent be ordered to cease and desist from discriminating against Aguirri for protected union activity and take certain affirmative action by, inter alia, expunging the suspension from its files and making Aguirri whole for any loss of income.

No exceptions were filed, and the findings, conclusions, and recommendations in the Decision of the Administrative Law Judge became the findings, conclusions, decision and order of the Authority, without precedential significance, on March 16, 1984.

The Back Pay Act, 5 U.S.C. § 5596 (1982), pertinently provides:

> (b)(1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee--
>
> (A) is entitled, on correction of the personnel action, to receive for the

> period of which the personnel action was in effect—
>
> . . . .
>
> (ii) reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title, or under chapter 11 of title 1 of the Foreign Service Act of 1980, shall be awarded in accordance with standards established under section 7701(g) of this title[.]

Section 550.806(c) and (d) of OPM's implementing Rules and Regulations provide:

> (c) Except as provided in paragraph (e) of this section, when an appropriate authority corrects or directs the correction of an unjustified or unwarranted personnel action that resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due an employee, the payment of reasonable attorney fees shall be deemed to be warranted only if -
>
> (1) Such payment is in the interest of justice, as determined by the appropriate authority in accordance with standards established by the Merit Systems Protection Board under section 7701(g) title 5, United States Code; and
>
> (2) There is a specific finding by the appropriate authority setting forth the reasons such payment is in the interest of justice.
>
> (d) When an appropriate authority determines that such payment is warranted, it shall require payment of attorney fees in an amount determined to be reasonable by the appropriate authority. When an appropriate authority determines that such payment is not warranted, no such payment shall be required.

In addition, in International Brotherhood of Electrical Workers and United States Army Support Command, Hawaii, 14 FLRA No. 90, 14 FLRA 680 (1984), the Authority addressed in detail for the first time the statutory requirements regarding awards of attorney fees.

In considering these various requirements, the Authority, as noted above, has found under applicable law that Aguirri was affected by an unjustified or unwarranted personnel action which resulted in the withdrawal or reduction of all or part of the pay of the employee. This is the required determination under the Back Pay Act and not whether the employee is "the prevailing party" as under 5 U.S.C. § 7701(g).[1/] However, to the extent the Authority deems "the prevailing party" element applicable, as it indicated in the International Brotherhood case, the General Counsel and the Charging Party were the prevailing parties. The General Counsel, representing the public interest in preventing unfair labor practices, met the burden of proof established by section 7118(a)(7) of the Statute and section 2423.18 of the Rules and Regulations. The Charging Party prevailed in that it obtained a significant part of the relief sought — a posting and relief for its local president. To the extent Aguirri also prevailed as an individual, it was in his representative capacity as president of the local Union. Aguirri signed the charge as the representative of the Charging Party. As a result of the proceeding, the discipline imposed upon him was reversed and he recovered back pay. The employee obtained a significant part of the relief sought and has clearly prevailed for purposes of establishing eligibility for an award of attorney fees. See Hodnick v. Federal Mediation and Conciliation Service, 4 MSPB 431, 434 (1980); Sterner v. Department of the Army, 711 F.2d 1563, 1566-67 (Fed. Cir. 1983) (approving the Board's decision in Hodnick); Carpenter v. Bureau of Alcohol, Tobacco and Firearms, 5 MSPB 432, 433 (1981). The fact that the employee was voluntarily represented by private counsel while a public official, the General Counsel, had the statutory mandate to investigate the alleged unfair labor practice and to

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[1/] 5 U.S.C. § 7701(g) (1982) provides:

> (1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee (as case may be) determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.
>
> (2) If an employee or applicant for employment is the prevailing party and the decision is based on a finding of discrimination prohibited under section 2302(b)(1) of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

file and prosecute the complaint will be considered in determining whether the fee request of the employee's counsel is reasonable if the other basic statutory requirements are met.[2]

In Allen v. U.S. Postal Service, 2 MSPB 582, 593 (1980) the Merit Systems Protection Board set forth for prospective guidance some of the circumstances in which attorney fees may be warranted in "the interest of justice," as follows:

> (1) Where the agency engaged in a "prohibited personnel practice" (§ 7701(g)(1));
>
> (2) Where the agency's actions was "clearly without merit" (7701(g)(1)), or was "wholly unfounded," or the employee is "substantially innocent" of the charges brought by the agency;
>
> (3) Where the agency initiated the action against the employee in "bad faith," including: a. Where the agency's action was brought to "harrass" the employee; b. Where the agency's action was brought to "exert improper pressure on the employee to act in certain ways";
>
> (4) Where the agency committed a "gross procedural error" which "prolonged the proceeding" or "severely prejudiced" the employee;
>
> (5) Where the agency "knew or should have known that it would not prevail on the merits" when it brought the proceeding. (Footnotes omitted).

The Charging Party contends that attorney fees in this case are warranted in the interests of justice because the agency action was (1) a prohibited personnel practice, as defined in 5 U.S.C. § 2302(b)(8), (9), and (11), (2) the agency's action was clearly without merit, (3) the agency knew or should have known that it could not prevail on the merits, and (4) the agency initiated the action against the employee in bad faith in order to both harass the employee and to exert improper pressure on the employee.

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[2] The General Counsel and Respondent took the position that once the charge and amended charge were filed with the Authority, substantially all of the legal effort from that point by the Charging Party's counsel appeared duplicative of work done by counsel for the General Counsel. The Charging Party's counsel disagreed vociferously and submitted an affidavit regarding his independent preparation and work. He also detailed his work in the pre-charge phase of the personnel action.

The Authority is without jurisdiction to adjudicate a prohibited personnel practice allegation.[3] Therefore, I do not consider this factor, which is properly considered by the Merit Systems Protection Board in determining attorney fee requests under 5 U.S.C. § 7701(g)(1), to be applicable to attorney fee requests made of the Authority in unfair labor practice cases under 5 U.S.C. § 5596(b).

In contending that the agency's action was clearly without merit and that the agency knew or should have known that it could not prevail on the merits when it brought the proceeding, and that the agency's action was initiated in bad faith, Mr. Angel, counsel for the Charging Party, has submitted an affidavit detailing his actions and the chronology of events. This affidavit reflects that after receipt by Mr. Aguirri of the notice of proposed suspension on June 15, 1982, Mr. Angel met with management officials and responded on June 24, 1982 with a detailed discussion of the right of union officers to publicize certain opinions during a labor dispute. Despite this exposition of the law, Respondent proceeded to suspend Aguirri. The Union's unfair labor practice charge followed. Angel points out that the final decision finding the suspension to be an unfair labor practice was based upon the same right of protection of speech in labor disputes which was highlighted in his response to Aguirri's proposed removal. Angel contends that Respondent proceeded with the suspension without any apparent concern for well established law. He also claims that the very finding of discrimination because of union activity establishes bad faith.

Respondent does not take issue with this portion of Angel's affidavit or argument.[4] Respondent concedes that, "Assuming _arguendo_ that

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[3] Similarly, the Merit Systems Protection Board has held that while the Board is without jurisdiction to adjudicate an unfair labor practice allegation based on anti-union animus, evidence of such animus may be relevant and material in establishing a retaliatory motive for an otherwise appealable adverse action taken in alleged reprisal for the exercise of appeal rights in violation of 5 U.S.C. § 2302(b)(9). _Bodinus v. Department of the Treasury,_ 7 MSPB 385 (1981); _Triplett v. Defense Logistics Agency_, Docket No. ATO 7528110871 (Jan. 19, 1984).

[4] In _Allen_ v. _U.S. Postal Service_, _supra_, the Merit Systems Protection Board emphasized that a request for an award of attorney fees should "set forth all considerations relied upon to demonstrate that the statutory requirements for an award have been met, substantiated by affidavits or other documentary evidence wherever there is a question of fact to be resolved (other than those already litigated on the merits). . . . The agency should likewise set forth in its response all considerations relied upon in opposition to an award, including affidavits related to contested

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attorney fees are authorized, the three reasons advanced by the fee applicant may be the basis for the payment of attorney fees." While the Respondent has failed to address these issues, the Merit Systems Protection Board has made it clear that the presiding official must make a "reasoned assessment on that issue [whether attorney fees are warranted in the interest of justice] in light of the entire record." Allen, supra.

At the hearing, Respondent presented evidence from its witnesses, the supervisors and its attorney, that they most certainly did not lie under oath, or suborn perjury; that they were embarrassed and humiliated by Aguirri's charges; that the charges could have been seen by employees outside the agency; and that one of the officials possibly included by implication in Aguirri's charge was not even in the office on the days in question, thus indicating some recklessness on Aguirri's part. The record also indicated that management, as part of the same controversy, had filed a grievance against the Union for violation of a provision of the parties' collective bargaining agreement prohibiting the posting of scurrilous or libelous material and had won that grievance.

Aguirri testified concerning his actions and the reasons for his actions. His testimony was credited. Except for a determination of and application of the applicable law, the credibility issue was very important. This issue could not have been resolved by further agency action.

Even as to the application of the law to the facts, page nine of the initial decision noted, "The question of whether Mr. Aguirri's posted statements were so defamatory that they lost the protection of the Statute does not lend itself to an easy resolution." The decision required, as initially contended by the Respondent, a careful balancing of the employee's light to engage in protected activity against the employer's right to maintain order and respect for its supervisory staff. As also noted on page nine of the decision, it also required a careful examination of all the circumstances in order to determine whether the employee had engaged in flagrant conduct beyond the ambit of protected activity.

Such an examination was conducted and resulted in a decision in the employees favor. However, I can not conclude from the entire record that Respondent's action was clearly without merit, that the agency knew or

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(Continued)

facts pertinent to the motion (other than those already adjudicated on the merits) or to the reasonableness of the amount claimed." In Kling v. Department of Justice, 2 MSPB 620 (1980), the Board also stated, "agencies and their representatives should . . . be cognizant to the need to address all pertinent issues, with rebuttal evidence as well as argument, in responding to motions [for attorney fees]."

should have known that it would not prevail on the merits, or that the action against the employee was initiated in bad faith.

Accordingly, it is concluded that an attorney fee award is not warranted in this case in the interest of justice. In view of this disposition, it is unnecessary to reach the issues posed with respect to the reasonable amount determination. Allen v. U.S. Postal Service, *supra*. It is recommended that the Authority adopt the following Order:

ORDER

IT IS HEREBY ORDERED that the Motion for Payment of Attorney Fees be, and it hereby is, DENIED.

Garvin Lee Oliver

GARVIN LEE OLIVER
Administrative Law Judge

Dated: October 16, 1984
Washington, DC

24 FLRA No. 85

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

VETERANS ADMINISTRATION
MEDICAL CENTER
LEAVENWORTH, KANSAS

Activity

and

Case No. 0-AR-1127

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 85

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the award of Arbitrator William O. Eisler filed on behalf of the Activity by the Veterans Administration (the Agency) pursuant to section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations.

II. BACKGROUND AND ARBITRATOR'S AWARD

The issue in this case, as determined by the Arbitrator, was whether bargaining unit employees were entitled to environmental differential or hazardous duty pay for exposure to airborne asbestos fibers while performing their duties and, if so, which employees were entitled to the pay and for what period of time. The Arbitrator found that all bargaining unit employees, Wage Grade as well as General Schedule, with the possible exception of those who worked in two buildings of recent construction, had been working in areas where airborne concentrations of asbestos fibers may have exposed them to potential illness or injury and that they had not been provided with any type of protective devices or safety measures to reduce the risk.

With respect to the Wage Grade employees, the Arbitrator found that a provision in the parties' agreement authorized environmental differential pay (EDP) for them in accordance with Office of Personnel Management (OPM)

Regulations. He concluded that they had been exposed to the hazards of airborne concentrations of asbestos since April 9, 1984. He awarded EDP for Wage Grade employees from April 9, 1984, until such time as it was established that the employees were no longer working in areas where they were exposed to asbestos or until protective devices or safety measures practically eliminated the potential for illness or injury.

As to the General Schedule employees, the Arbitrator found a provision in the parties' agreement authorizing hazardous duty pay (HDP) for them for irregular or intermittent hazardous duty in accordance with OPM Regulations. He concluded that at least on an intermittent basis the General Schedule employees had also been exposed to the hazards of airborne concentrations of asbestos. He awarded hazardous duty pay for the General Schedule employees to the extent allowed by law and regulations. The Arbitrator directed the Activity to request, through its central office, an amendment to OPM's Regulations so that the General Schedule employees properly could receive hazardous duty pay for their exposure to asbestos.

III. FIRST EXCEPTION

A. Contentions

In its first exception the Agency contends that the award of environmental differential pay to the Wage Grade employees is contrary to FPM Supplement 532-1 and Appendix J. In support of its exception, the Agency argues that although asbestos is listed in Appendix J as a category for which EDP is payable pursuant to FPM Supplement 532.1, the Arbitrator did not specificially find that the Wage Grade employees were actually exposed to asbestos. The Agency asserts that the Arbitrator speculated that the employees might have been exposed and required the Activity to pay EDP until it could show that the employees were no longer exposed.

B. Analysis and Conclusions

We conclude that this exception does not provide a basis for finding the award deficient. It is well established that specific work situations for which environmental differential is payable under the categories of FPM Supplemental 532.1, Appendix J are left to local determination, including arbitration. See Norfolk Naval Shipyard, Portsmouth, Virginia and Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO, 10 FLRA 413 (1982).

In this case the Arbitrator found that all bargaining unit employees, with the possible exception of those working in the two new buildings, worked in areas where they were exposed to airborne asbestos in concentrations which may have subjected them to illness or injury. Consequently, with the Arbitrator expressly finding that payment of an environmental differential to Wage Grade employees was warranted under Appendix J, no basis has been presented for finding the award to be contrary to FPM Supplement 532-1.

IV. SECOND EXCEPTION

A. Contentions

In its second exception the Agency contends that the Arbitrator's award of EDP is contrary to the Back Pay Act, 5 U.S.C. § 5596. Specifically, the Agency argues that the Arbitrator did not make the necessary finding that the employees had been subjected to an unjustified or unwarranted personnel action.

B. Analysis and Conclusions

We conclude that this exception does not provide a basis for finding the award deficient. FPM Supplement 532-1, subchapter S8-7f makes it clear that payment of an environmental differential is authorized for Wage Grade employees when they are performing assigned duties which expose them to a hazard, physical hardship, or working condition of a unusually severe nature listed in Appendix J. Consequently, on the basis of the Arbitrator's finding that the Wage Grade employees were exposed to airborne asbestos fibers, these employees were entitled to have been paid an environmental differential under Appendix J. Likewise, the Backpay Act makes it clear that an award of backpay by an arbitrator is authorized to remedy an unjustified or unwarranted personnel action that has resulted in the withdrawal of a differential that the employees would otherwise have received. 5 U.S.C. § 5596(b)(1)(A)(i) (1982). See Department of the Air Force, Griffis Air Force Base and American Federation of Government Employees, Local 2612, 15 FLRA 213 (1984).

The unwarranted personnel action in this case was the Activity's failure to pay the environmental differential for the time in which the Wage Grade employees were exposed to asbestos. Since the Arbitrator expressly determined that the Wage Grade employees were entitled to EDP, the Activity's failure to pay the differential was an unjustified or unwarranted personnel action within the meaning of the Back Pay Act. By directing that these employees be reimbursed for all losses caused by the unwarranted personnel action, the Arbitrator's award constitutes the finding, required by the Back Pay Act and the decisions of the Authority, that but for the unwarranted action, the employees would not have suffered a withdrawal or reduction of their pay, allowances, or differentials. *American Federation of Government Employees, Local 1760 and Social Security Administration, Northeastern Program Service Center*, 22 FLRA No. 19 (1986).

V. THIRD EXCEPTION

A. Contentions

In its third exception the Agency contends that the award of hazardous duty pay to General Schedule employees is contrary to 5 CFR § 550.901-907 and Appendix A. In support of its exception, the Agency argues that although these regulations provide for the payment of differentials for irregular or intermittent duty involving unusual physical hardship or hazard to General Schedule employees, Appendix A, which provides a schedule of hazardous duties, does not list asbestos exposure as a hazard for which HDP is payable. Consequently, the Agency argues the Arbitrator's finding that the Agency is obligated to pay HDP to General Schedule employees is contrary to OPM regulations.

B. Analysis and Conclusions

We find that the Agency has failed to show that the award is contrary to 5 CFR § 550.901-907 and Appendix A. The Arbitrator did not award an unqualified payment of HDP to General Schedule employees. Rather, the Arbitrator only awarded HDP to the extent allowed by law and regulation. Obviously, if HDP is not authorized by the current regulatory scheme it cannot be paid. If OPM retroactively amends its regulations, in response to the Agency's request as ordered by the Arbitrator, HDP would then be authorized and the Agency would then be obligated to pay the differential to the General Schedule employees consistent with the Arbitrator's award. Also, the Arbitrator's award represents his interpretation of the provision in the parties' agreement which permits HDP for General Schedule employees in accordance with OPM's Regulations. Thus, we conclude that this exception does not provide a basis for finding the award to be deficient.

VI. FOURTH EXCEPTION

A. Contentions

In its fourth exception the Agency contends that the Arbitrator exceeded his authority in directing the Agency to request an amendment to OPM's Regulations.

B. Analysis and Conclusions

We conclude that this exception does not provide a basis for finding that the Arbitrator's award is deficient as alleged. An arbitrator can properly direct an agency to take an action which is within its authority and which would not violate law, rule or regulation. U.S. Immigration and Naturalization Service and American Federation of Government Employees, AFL-CIO, Local 1917, 20 FLRA No. 41 (1985). In this case, 5 CFR § 550.903 authorizes any agency to request amendments to Appendix A. Thus, the Arbitrator's award directed the Agency to take an action which was within its authority.

VII. DECISION

For the above reasons, the Agency's exceptions are denied.

Issued, Washington, D.C., December 29, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE NAVY
NORTHERN DIVISION, NAVAL
FACILITIES ENGINEERING COMMAND

Respondent

and

Case No. 2-CA-1091
(19 FLRA No. 86)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1430

Charging Party

DECISION AND ORDER ON REMAND

This case is before the Authority on remand from the U.S. Court of Appeals for the District of Columbia Circuit. The Authority issued its original Decision and Order in the case on August 12, 1985. The Authority found that the Respondent had not violated section 7116(a) and (5) when it unilateraly changed the functions of the Incentive Award Committee on which the Union had a role as an observer. Department of the Navy, Northern Division, Naval Facilities Engineering Command, 19 FLRA No. 86 (1985), rev'd and remanded sub nom., National Federation of Federal Employees, Local 1430 v. FLRA, No. 85-1648 (D.C. Cir. Nov. 6, 1986). In finding that the Respondent had not committed an unfair labor practice, the Authority relied on an earlier decision in National Treasury Employees Union and Internal Revenue Service, 14 FLRA 464 (1984), rev'd and remanded sub nom., NTEU v. FLRA, 793 F.2d 371 (D.C. Cir. 1986).

As indicated, the U.S. Court of Appeals for the District of Columbia Circuit subsequently reversed the Authority's decision in National Treasury Employees Union and Internal Revenue Service. In reversing the Authority's decision in that case, the court rejected the Authority's conclusion that the determination of whether a particular level of job performance warrants granting an incentive award is included within management's rights to assign work and direct employees. Upon consideration of the court's decision, the Authority sought remand of this case, which was then pending before the court on appeal.

On November 6, 1986, in response to the Authority's motion for remand in this case, the U.S. Court of Appeals for the District of Columbia Circuit, after citing the history noted above, reversed the Authority's previous decision and remanded the case "for a determination of a proper remedy for the employer's refusal to bargain."

The Authority accepts the court's opinion as the law of the case and consistent with that opinion shall fashion an appropriate remedial order. While agreeing with the Administrative Law Judge that a status quo ante remedy is appropriate, we disagree with his rationale in reaching that conclusion. We find, as contended by the General Counsel in his exceptions, that where management has made a unilateral change in a negotiable term and condition of employment, effectuation of the purposes and policies of the Statute requires a return to the status quo ante, absent special circumstances, in order not to render meaningless the material obligation to negotiate. Veterans Administration, West Los Angeles Medical Center, Los Angeles, California, 23 FLRA No. 37, slip op. at 4 n.3 (1986). Noting no evidence of special circumstances, we find that Respondent's bare assertion in its exceptions that implementation of a status quo ante remedy in this case would violate the requirements of 5 U.S.C. § 4302 amounts to nothing more than mere conjecture and provides no basis for not imposing such a remedy in this case.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Staute, it is ordered that the Department of the Navy, Northern Division, Naval Facilities Engineering Command shall:

1. Cease and desist from:

(a) Unilaterally changing the functions of the Incentive Awards/Performance Appraisal Committee by removing from its purview any review and recommendation to the Commander as to Quality Step Increases, Outstanding Performance Ratings and Sustained Superior Performance Awards, for unit employees, without first notifying the National Federation of Federal Employees, Local 1430, the exclusive bargaining respresentative, and affording it the opportunity to bargain, to the extent consonant with law and regulations, on the decision to effectuate such action.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Rescind and withdraw NORTHNAVFACENGCOM NOTICE 12451, dated June 24, 1981, and its provisions which removed from the purview of the Incentive Awards/Performance Appraisal Committee any functions as to its review and recommendation to the Commander concerning Quality Step Increases, Outstanding Performance Ratings and Sustained Superior Performance Awards, for unit employees.

(b) To the extent consonant with law and regulations, restore the procedure which existed prior to December 26, 1979 whereby the Incentive Awards/Performance Appraisal Committee reviewed proposed Quality Step Increases, Outstanding Performance Ratings, Sustained Superior Performance Awards, in addition to Unsatisfactory Ratings, Beneficial Suggestions, and Special Achievement Awards, and made recommendations thereon to the Commander.

(c) Notify the National Federation of Federal Employees Local 1430, the exclusive bargaining representative, of any intention to change the functions of the Incentive Awards/Performance Appraisal Committee, or to remove from its purview any review and recommendation to the Commander as to proposed awards, and, upon request, bargain with said representative, to the extent consonant with law and regulations, on the decision to effectuate such action.

(d) Post at its facilities at the Northern Division, Naval Facilities Engineering Command, Philadelphia, Pennsylvania, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander, and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such notices are not altered, defaced, or covered by any other material.

(e) Pursuant to section 2423.30 of the Authority's Rules and Regulations notify the Regional Director, Region II, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order as to what steps have been taken to comply with it.

It is further ordered that the remaining allegations of the complaint concerning Respondent's failure to cooperate in impasse procedures of the Federal Service Impasses Panel are dismissed.

Issued, Washington, D.C. December 29, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE
WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally change the functions of the Incentive Awards/Performance Appraisal Committee by removing from its purview any review and recommendation to the Commander as to Quality Step Increases, Outstanding Performance Ratings and Sustained Superior Performance Awards, for unit employees, without first notifying the National Federation of Federal Employees, Local 1430, the exclusive bargaining respresentative, and affording it the opportunity to bargain, to the extent consonant with law and regulations, on the decision to effectuate such action.

WE WILL NOT any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL rescind and withdraw NORTHNAVFACENGCOM NOTICE 12451, dated June 24, 1981, and its provisions which removed from the purview of the Incentive Awards/Performance Appraisal Committee any functions as to its review and recommendation to the Commander concerning Quality Step Increases, Outstanding Performance Ratings and Sustained Superior Performance Awards, for unit employees.

WE WILL, to the extent consistent with law and regulation, restore the procedure which existed prior to December 26, 1979 whereby the Incentive Awards/Performance Appraisal Committee reviewed proposed Quality Step Increases, Outstanding Performance Ratings, Sustained Superior Performance Awards, in addition to Unsatisfactory Ratings, Beneficial Suggestions, and Special Achievement Awards and made recommendations thereon to the Commander.

(24 FLRA No. 86)

WE WILL notify the National Federation of Federal Employees, Local 1430, the exclusive bargaining representative, of any intention to change the functions of the Incentive Awards/ Performance Appraisal Committee, or to remove from its purview any review and recommendation to the Commander as to proposed awards, and, upon request, bargain with said representative, to the extent consonant with law and regulations, on the decision to effectuate such action.

____

Dated: __________________ By: __________________

This Notice must remain posted for 60 consecutive days from the date of posting and must not be alterd, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Region II, Federal Labor Relations Authority whose address is: 26 Federal Plaza, Room 3700 New York, New York, 10278; and whose telephone number is: (212) 264-5934.

*U.S. GOVERNMENT PRINTING OFFICE:1987-181-223:60003

9/Case No. 417

Federal Labor Relations Authority

Washington, D.C. 20424

NUMBER 417 REPORT OF CASE DECISIONS December 30, 1986

REPRESENTATION CASE

24 FLRA No. 89 (December 30, 1986)

U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, Northeast Region and International Organization of Masters, Mates and Pilots (IOMMP), AFL-CIO), Case No. 1-CU-50002

UNFAIR LABOR PRACTICE CASE

24 FLRA No. 92 (December 31, 1986)

Department of Commerce, Bureau of Census and Edward Hanlon, an individual, Case No. 3-CA-50375

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NEGOTIABILITY CASES

24 FLRA No. 90 (December 30, 1986)

American Federation of Government Employees, National GSA Council (No 236), Local 1497 and General Services Administration, Region 3, Case No. O-NG-1190

24 FLRA No. 91 (December 30, 1986)

American Federation of Government Employees, AFL-CIO, Local 987 and Department of the Air Force, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia, Case No. O-NG-1309

Y 3.F 31/21-3:

24 FLRA No. 94 (December 31, 1986)

National Federation of Federal Employees, Local 1374 and Pacific Missile Test Center, Department of the Navy, Case No. 0-NG-1271

24 FLRA No. 88 (December 30, 1986)

National Labor Relations Board Union and National Labor Relations Board, Office of the General Counsel and the Board, Case No. 0-NG-900

ARBITRATION CASES

24 FLRA No. 87 (December 19, 1986)

American Federation of Government Employees, Council 236 and General Services Administration (Kaplan, Arbitrator), Case Nos. 0-AR-711 and 0-AR-772

24 FLRA No. 93 (December 31, 1986)

U.S. Department of Health and Human Services, Social Security Administration and American Federation of Government Employees, Local No. 547 (Kanzer, Arbitrator), Case No. 0-AR-1148

24 FLRA No. 95 (December 31, 1986)

Warner Robins Air Logistics Center, Department of the Air Force, Warner Robins, Georgia and American Federation of Government Employees, Local No. 987 (Williams, Arbitrator), Case No. 0-AR-1129

Federal Labor Relations Authority

24 FLRA No. 87

AFGE, Council 236 and GSA,
Case No. 0-AR-711 and 0-AR-772
(Decided December 19, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
ARBITRATION AWARDS, PROCEDURE	7122(a)

- ARBITRATION AWARDS, PROCEDURE
  - FINALITY OF AWARD
    - INCONSISTENCY OF A FLRA SUBSEQUENT DECISION
- PROCEDURE
  - RECONSIDERATION OF AUTHORITY DECISIONS
    - EXTRAORDINARY CIRCUMSTANCES [5 C.F.R. 2429.17]
      - INCONSISTENCY WITH SUBSEQUENT DECISIONS NOT EXTRAORDINARY
    - TIME LIMITS FOR FILING A MOTION FOR RECONSIDERATION
      - WAIVER

DIGEST NOTES

The fact that an Authority decision may be inconsistent with its subsequent decisions is not such an extraordinary circumstance as to warrant either waiving the expired time limit for filing a motion for reconsideration or reopening those decisions. The Authority, like other administrative agencies and the courts, may enunciate a new rule of law without reopening previously decided cases and retroactively applying the new law. To do so would have chaotic results. The determination as to whether the new law will be applied retroactively to closed cases is based upon evaluation of the circumstances involved in each situation and consideration of a number of factors, including the effects of allowing relitigation.

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Federal
Labor Relations
Authority

24 FLRA No. 88

NLRB Union and NLRB, Office of the General Counsel and the Board, Case No. 0-NG-900
(Decided December 30, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
INFORMATION, UNION RIGHTS	7105(a)(2)(E)
NECESSITY OR RELEVANCE	7114(b)(4)

- INFORMATION, UNION RIGHTS
  - NECESSITY OR RELEVANCE
    - ALTERNATIVES AVAILABLE
      - MERE EXISTENCE OF OTHER MEANS NOT SUFFICIENT FOR DENIAL
  - NEGOTIATIONS FOR INFORMATION
  - PRIVACY
    - PRIVACY ACT [5 U.S.C. 552a]
      - EXCEPTION: ROUTINE USE [5 U.S.C. 552a(b)(3)]
        - NAMES AND HOME ADDRESSES OF UNIT EMPLOYEES
  - REQUEST FOR INFORMATION
    - REASONS FOR REQUEST
      - REASON FOR REQUEST IS VERY APPARENT
  - TYPES OF INFORMATION SOUGHT
    - NAMES AND ADDRESSES OF EMPLOYEES
- UNITED STATES CODE
  - 5 U.S.C. 552a [PRIVACY ACT]
  - 5 U.S.C. 552a(b)(3)

DIGEST NOTES

A proposal is negotiable that requires the agency to furnish the union with the names and addresses of unit employees; position title; grade; and date of last promotion. The disclosure of the names and addresses of unit employees falls under the routine use exception of the Privacy Act, 5 U.S.C. 552a(b)(3). Moreover, the union's written request for the names and addresses of unit employees does not have to be supported by an explanation of the reasons for the request, as is usually required by section 7114(b)(4), since the exclusive representatives' need for the names and addresses is very apparent and essential. Furthermore, while section 7114(b)(4) obligates an agency to furnish an exclusive representative with information, to the extent not prohibited by law, necessary for the bargaining process, no provision of the Statute precludes the parties from negotiating contractual provisions requiring release of information which is otherwise not unlawful.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

24 FLRA No. 89

Federal Labor Relations Authority

Dep't of Commerce, NOAA, National Marine Fisheries Service, Northeast Region and International Organization of Masters, Mates and Pilots, Case No. 1-CU-50002 (Decided December 30, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE

APPROPRIATE UNITS [7112]
  ACCRETION
    OF A LARGER GROUP INTO A SMALLER UNIT
  CONSIDERATIONS WHEN MAKING DETERMINATIONS OF 7112(a)(1) CRITERIA
    CONDITIONS OF EMPLOYMENT
    DURATION OR PERMANENCY OF APPOINTMENT
    DUTIES
    FRINGE BENEFITS
    PERFORMANCE PLANS
    PROMOTION SYSTEM
    SUPERVISION
    TRAVEL AND PER DIEM COMPENSATION
  PETITIONS
    CLARIFICATION OF UNIT (CU) PETITIONS
EMPLOYEE CLASSIFICATION AND DEFINITION
  INTERMITTENT EMPLOYEES
  TEMPORARY
REPRESENTATION PROCEDURE
  COMPELLING REASONS FOR GRANTING REVIEW
    SUBSTANTIAL QUESTION OF POLICY OR LAW
  MOOT

DIGEST NOTES

The Authority granted review of a Regional Director's determination in a clarification of unit petition based on a finding that a substantial issue of law or policy existed because of the absence of Authority precedent. At the time of the hearing the activity employed 24 temporary intermittent Foreign Fisheries Observers and 8 permanent part-time observers. The Regional Director had dismissed the activity's petition and noted that the Authority has never addressed the propriety of adding a larger group of unrepresented employees to a smaller unit by means of a clarification of unit petition.

The Authority agreed with the Regional Director that the petition should be dismissed but for different reasons. In the Authority's view the temporary intermittent observers were included in the unit with the permanent part-time observers from the beginning of their employment. The only difference between the permanent part-time observers and the temporary intermittent observers was that the permanent part-time observers enjoy Federal employee benefits. Otherwise both groups (1) are initially hired at the GS-5 level and can progress to a journeyman level of GS-9; (2) share common supervision, performance plans, and working conditions; (3) perform the same duties while deployed on foreign fishing vessels; and (4) are compensated for their travel and per diem expenses at the prevailing rate. The record also indicated that the temporary intermittent observers have a reasonable expectancy of future employment as most of them work for up to four years.

Federal Labor Relations Authority

24 FLRA No. 90

AFGE, National GSA Council (No. 236), Local 1497 and GSA, Region 3, Case No. 0-NG-1190 (Decided December 30, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
APPROPRIATE ARRANGEMENTS	7105(a)(2)(E)
APPLICABLE ONLY TO 7106 RIGHTS	7106(a)(2)(A), (B)
REDUCTION-IN-FORCE ARRANGEMENTS	7106(b)(1) and (3)
ASSIGN EMPLOYEE	
DETERMINATION OF THE QUALIFICATIONS NECESSARY TO DO WORK	
DETERMINATION OF JOB-RELATED INDIVIDUAL CHARACTERISTICS	
ASSIGN WORK, RESERVED MANAGEMENT RIGHT	
LOCATION OF WORK	
POSITION, FILLING OF	
SECURITY	
COLLECTIVE BARGAINING PROCESS AND THE DUTY TO BARGAIN	
DUTY TO BARGAIN EXTENDS ONLY TO C.O.E. OF UNIT EMPLOYEES	
COMPETITIVE AREAS	
CONDITIONS OF EMPLOYMENT, NON-UNIT EMPLOYEES	
EXECUTIVE ORDER 10450	
INTERNAL SECURITY PRACTICES, RESERVED MANAGEMENT RIGHT	
ACCOMMODATE OR RETAIN EMPLOYEES WHO DO NOT HAVE CLEARANCES	
NEGOTIABILITY PROCEDURE	
ALLEGATION OF NONNEGOTIABILITY	
UNSOLICITED ALLEGATION OF NONNEGOTIABILITY	
SPECIFICITY	
PURPOSE AND EFFECT OF PROPOSAL NOT SUFFICIENTLY CLEAR	
NUMBERS, TYPES AND GRADES OF EMPLOYEES, DETERMINATION OF	
SECURITY	
POSITION, FILLING OF	
PRIORITY OR PREFERENTIAL TREATMENT	
REDESIGN OF POSITION	
REPROMOTION ELIGIBLE EMPLOYEES AS A RESULT OF A RIF	
CONSIDERATION	
SELECT FROM AMONG	
PROCEDURE, FORUMS, FACTUAL ISSUES	
REDUCTION-IN-FORCE	
FILLING POSITIONS DURING OR FOLLOWING A RIF	
PREFERENTIAL TREATMENT FOR EMPLOYEES AFFECTED BY THE RIF	
SECURITY CLEARANCES	
PERFORMANCE OF NECESSARY ADMINISTRATIVE REQUIREMENTS	

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

DIGEST NOTES

A Proposal is nonnegotiable that would include in the RIF competitive area, employees in bargaining units represented by unions other than the exclusive representative. The proposal is not an appropriate arrangement under 7106(b)(3). That section applies only when management is exercising one its reserved management rights under section 7106. (proposal 1)

A proposal that the union explained was intended to provide preference in filling vacancies for employees affected by a RIF -- did not correspond to the wording of the proposal which was not sufficiently clear to permit the Authority to make a determination. However, the Authority cited previous decisions regarding priority selection and priority consideration of repromotion eligible employees. (proposal 2)

A proposal is negotiable that requires the agency to perform necessary administrative requirements within its discretion to facilitate the issuance of security clearances. The proposal does not interfere with management's right to determine its internal security practices nor is it contrary to Executive Order 10450 concerning the authority to deny or revoke security clearances. (proposal 3)

A proposal is an appropriate arrangement for employees adversely affected by a RIF that would require the agency to establish a nonsecure worksite for employees who lose or cannot obtain the necessary security clearances. The employees would otherwise be assigned to positions that do not require security clearances at the worksite if it were not for the requirement of the agency that all employees at the worksite have clearances. The agency's requirement that employees have security clearances is an exercise of its right to assign employees under section 7106(a)(2)(A). That right encompasses the discretion to determine the qualifications necessary to do the work as well as such job-related individual characteristics as judgment and reliability. While the proposal infringes on management's right to assign employees, it does not do so to an excessive degree. Moreover, the proposal does not interfere with management's right to assign work or determine the personnel by which the agency's operations are to conducted. (majority opinion, proposal 4)

In a dissenting opinion, on Authority Member found the proposal to be nonnegotiable because it excessively interfered with management's right to assign employees and therefore was not an appropriate arrangement. Moreover, the proposal interfered with the agency's right to assign work. (dissenting opinion, proposal 4)

24 FLRA No. 91

Federal
Labor Relations
Authority

AFGE, Local 987 and Dep't of the Air Force, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia, Case No. 0-NG-1309 (Decided December 30, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
FACILITIES, EQUIPMENT AND SERVICES	7105(a)(2)(E)
ACCESS	7106(a)(1) and (b)(1)
SECURITY LIMITATIONS	
SECURITY	
INTERNAL SECURITY PRACTICES, RESERVED MANAGEMENT RIGHT	
DETERMINATION OF WHAT IS NECESSARY TO SAFEGUARD PHYSICAL PROPERTY	
FACILITIES AND EQUIPMENT	
SECURITY	
SECURITY	
INTERNAL SECURITY PLAN	
PROPOSAL NEGATES PLAN	
MILITARY INSTALLATIONS	
REMOTE ACCESS TO AIR FORCE BASE	

DIGEST NOTES

A proposal is nonnegotiable that requires the agency to permit employee access to an air force base through a remote gate that the agency closed to better safeguard and protect its facilities, aircraft and employees. An agency's right to determine its internal security practices under section 7106(a)(1) includes the right to determine what is necessary to safeguard its physical property against internal or external risks. The union's proposal that the gate be kept open negates management's internal security plan, and therefore violates management's right to determine its internal security practices.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

24 FLRA No. 92

Federal Labor Relations Authority

Dep't of Commerce, Bureau of Census and Edward Hanlon, Case No. 3-CA-50375 (Decided December 31, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
AGENCY ULP (ALLEGED) 7116(a)(1)	7102
FACILITIES, EQUIPMENT AND SERVICES	7116(a)(1) and (8)
EMPLOYEE RIGHTS	7118
ACCESS TO FACILITIES	
FACILITIES, EQUIPMENT AND SERVICES	
ACCESS	
NON-WORK AREAS WHILE IN NON-DUTY STATUS	
EMPLOYEE RATHER THAN UNION AGENT STATUS	

DIGEST NOTES

An employee did not have the right to set up employee-owned tripods during nonwork time in nonwork areas of the agency's facilities in order to disseminate information relating to a rival labor organization. Consequently, the agency did not violate section 7116(a)(1) for refusing to grant permission to use the facilities. The employee was acting as an employee and not as an agent for a labor organization. The agency had previously granted permission to use tripods in nonwork areas only to agency officials and recognized employee groups, including labor organizations, to disseminate information relating to group activities. There was not a practice of granting similar permission to individual employees and the agency denied the employee request based on the need to prevent indiscriminate use of tripods on its premises by 3,000 individual employees. In denying the individual's request to set up tripods, the Judge noted that the agency was also concerned about its obligations under the Statute to the exclusive representative of all the employees in the bargaining unit, and the possible violation of sections 7114(a)(1) and 7116(a)(8) if it granted the request.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Federal Labor Relations Authority

24 FLRA No. 93

HHS, SSA and AFGE, Local No. 547 (Kanzer, Arbitrator), Case No. 0-AR-1148 (Decided December 31, 1986)

SUBJECT MATTER INDEX ENTRIES

- ARBITRATION
  - HEARING
    - ARBITRATOR'S LATITUDE IN CONDUCT OF HEARING
- ARBITRATION AWARDS, EXCEPTIONS
  - ARBITRATOR FAILED TO CONDUCT A FAIR HEARING [BY:]
    - REFUSING TO HEAR PERTINENT AND MATERIAL EVIDENCE
  - AWARD BASED ON NONFACT
- ARBITRATION AWARDS, REVIEW OF, NO BASIS FOR REVIEW
  - DISAGREEMENT WITH ARBITRATOR'S REASONING AND CONCLUSIONS
- DISCIPLINE OF EMPLOYEES
  - JUST CAUSE
  - SUSPENSION
  - PERFORMANCE BASED DISCIPLINE
    - WARRANTED

STATUTE

7122(a)

DIGEST NOTES

The arbitrator found that the discipline of the grievant for poor performance was warranted for just cause. In its first exception, the union contended that the arbitrator failed to conduct a fair hearing by refusing to hear material and relevant evidence. The union claimed that the two hours allotted for the union's presentation did not permit it to call all of its witnesses and the arbitrator thereby failed to consider all of the union's relevant and material evidence. In cases involving a question as to the fairness of a hearing, the Authority has recognized that an arbitrator has considerable latitude in the conduct of the hearing. The fact that the arbitrator conducted the hearing in a manner which one party finds objectionable does not support a contention that the arbitrator denied that party a fair hearing. The Authority held that the union did not substantiate in what manner the arbitrator's exclusion of the testimony or documentation demonstrates that the arbitrator was bias or partial and, consequently that he failed to conduct a fair hearing.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

In its second exception, the union contended that the award was based on a nonfact. The Authority will find an award deficient when it is demonstrated that the central fact underlying the award is concededly erroneous and in effect is a gross mistake of fact but for which a different result would have been reached. The Authority held that the union's assertion that the arbitrator erred in various respects constituted nothing more than disagreement with the arbitrator's reasoning and conclusions and an attempt to relitigate the merits of the dispute.

Federal
Labor Relations
Authority

24 FLRA No. 94

NFFE, Local 1374 and Pacific Missile Test Center, Department of the Navy, Case No. 0-NG-1271 (Decided December 31, 1986)

SUBJECT MATTER INDEX ENTRIES

CODE OF FEDERAL REGULATIONS
- 5 C.F.R. 551.203(c)
- 5 C.F.R. 551.207

COMPENSATION SYSTEM
- AUTHORITIES GOVERNING PAYMENT TO FEDERAL EMPLOYEES
  - 29 U.S.C. 201 ET SEQ. [FAIR LABOR STANDARDS ACT]

EMPLOYEE CLASSIFICATION AND DEFINITION
- EXEMPT EMPLOYEE UNDER THE FLSA

GOVERNMENT-WIDE RULES OR REGULATIONS
- FOUND TO BE GOVERNMENT-WIDE REGULATIONS
  - 5 C.F.R. 551.203(c)
  - 5 C.F.R. 551.207

PREMIUM PAY
- FAIR LABOR STANDARDS ART [29 U.S.C. 201 ET. SEQ.]

UNITED STATES CODE
- 29 U.S.C. 201 ET SEQ. [FAIR LABOR STANDARDS ACT]

STATUTE

7105(a)(2)(E)
7117(a)(1)

DIGEST NOTES

A proposal is nonnegotiable that would require local agency officials to make an independent determination of employee status under the FLSA, contrary to the requirements of 5 C.F.R. 551.207 that such determinations be made, not unilaterally, but in consideration of and subsequent to an advisory opinion of OPM. The regulation is a government-wide regulation.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Federal Labor Relations Authority

24 FLRA No. 95

Warner Robins Air Logistics Center, Dep't of the Air Force, Warner Robins, Georgia and AFGE, Local No. 987 (Williams, Arbitrator), Case No. 0-AR-1129 (Decided December 31, 1986)

SUBJECT MATTER INDEX ENTRIES

STATUTE

7122(a)

- ARBITRATION
  - HARMFUL ERROR
    - RULE DOES NOT APPLY TO SUSPENSIONS FOR 14 DAYS OR LESS
  - HEARING
    - ARBITRATOR'S LATITUDE IN CONDUCT OF HEARING
    - CONTINUANCE NOT WARRANTED
      - UNION HAD AMPLE TIME TO MAKE ARRANGEMENTS
    - *EX PARTE* HEARING
      - OTHER PARTY HAD A CHANCE TO PARTICIPATE AND BE HEARD
- ARBITRATION AWARDS, REVIEW OF, EXCEPTIONS ASSERTED IN APPEAL:
  - ARBITRATOR FAILED TO CONDUCT A FAIR HEARING [BY:]
    - GRIEVANT AND/OR UNION REPRESENTATIVE NOT PRESENT
  - HARMFUL ERROR, ARBITRATOR'S MADE A [BY:]
    - FAILING TO GRANT A CONTINUANCE OF THE HEARING
- DISCIPLINE OF EMPLOYEES
  - JUST CAUSE
  - SUSPENSION
    - HARMFUL ERROR RULE IN ARBITRATION
      - DOES NOT APPLY TO SUSPENSIONS FOR 14 DAYS OR LESS
- ENFORCEMENT AND COMPLIANCE
  - ARBITRATION AWARDS
    - *EX PARTE* HEARINGS, AWARDS RESULTING FROM
      - HAVE BEEN ENFORCED BY FEDERAL COURTS
- UNITED STATES CODE
  - 5 U.S.C. 7503

DIGEST NOTES

The grievance in this case concerns the activity's five-day suspension of the grievant for leaving his work area without permission and for threatening a supervisor. The arbitrator denied the union's request for a continuance of the hearing because it had ample notice that its representative might not be able to attend and to make arrangements for an alternate. The arbitrator found that the suspension was for just cause and denied the grievance.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

In its exceptions, the union contended that the award was deficient because the arbitrator held the hearing without the grievant and union representative and thereby violated the principles of fairness and due process. As a result, it asserted that the award was deficient because it was "procured by '*ex parte*'" contacts and constituted harmful error. The Authority concluded that the exceptions failed to establish that the arbitrator's award was deficient. The award was not procured by *ex parte* contacts with the arbitrator since the hearing was conducted with the knowledge of the union and its absence was by choice. Also, awards resulting from *ex parte* hearings have been enforced by Federal courts based upon the rationale that since the losing party had a chance to be heard and refused to participate it should not now complain that the award is invalid because it chose to stay away. Finally, there is not a basis upon which to conclude that the arbitrator's denial of the continuance constituted a "harmful error" since this rule does not apply to suspensions for 14 days or less instituted under 5 U.S.C. 7503.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, COUNCIL 236

Union

and

Case Nos. 0-AR-711
and 0-AR-772

GENERAL SERVICES ADMINISTRATION

Agency

ORDER DENYING MOTION FOR RECONSIDERATION

I. STATEMENT OF THE CASE

These cases are before the Authority at this time on a motion filed by the Agency on April 30, 1985, seeking reconsideration of the Authority's decision of April 6, 1984, in Case No. 0-AR-711,[1/] and of its decision of August 28, 1984, in Case No. 0-AR-772. In each of the cases, the Authority concluded that the Agency had failed to establish in its exceptions that the Arbitrator's award was deficient on any of the grounds set forth in section 7122(a) of the Federal Service Labor-Management Relations Statute. The Authority therefore denied the Agency's exceptions.

II. AGENCY'S CONTENTIONS

In its motion for reconsideration, the Agency essentially contends that the Authority's decisions are inconsistent with the March 26, 1985 decision of the Authority in National Federation of Federal Employees, Local 615 and National Park Service, Sequoia and Kings Canyon National

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[1/] This is the second motion for reconsideration filed by the Agency in Case No. 0-AR-711. The first was denied by the Authority by Order of August 28, 1984.

Parks, U.S. Department of Interior, 17 FLRA 318 (1985), aff'd. sub nom. NFFE Local 615 v. FLRA, 801 F.2d 477 (D.C. Cir. Sept. 12, 1986). The Agency argues that because of this inconsistency, circumstances exist which compel reconsideration by the Authority of the disputed decisions.

It also appears that the Agency is seeking a waiver of the expired time limit for filing its motion.[2] The Agency's motion was filed nearly eight months after the Authority denied the Agency's first motion for reconsideration in Case No. 0-AR-711 and denied the Agency's exceptions in Case No. 0-AR-772.

III. ANALYSIS AND CONCLUSION

Section 2429.17 of the Authority's Rules and Regulations provides, in pertinent part:

> § 2429.17 Reconsideration.
>
> After a final decision or order of the Authority has been issued, a party to the proceeding before the Authority who can establish in its moving papers extraordinary circumstances for so doing, may move for reconsideration of such final decision or order. The motion shall be filed within 10 days after service of the Authority's decision or order.

We conclude that the Agency has failed to establish any extraordinary circumstance which would warrant waiving the expired time limit for filing its motion for reconsideration and compel or warrant reopening and reconsidering Case Nos. 0-AR-711 or 0-AR-772. The Agency has failed to establish that the decisions in these cases were inconsistent with existing precedent when they were issued. Moreover, even assuming that the decisions are inconsistent with Sequoia and Kings Canyon, such a circumstance does not by itself warrant reopening and reconsidering the closed cases.

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[2] Section 2429.23(b) of the Rules and Regulations provides, in pertinent part:

> [T]he Authority . . . may waive any expired time limit in this subchapter in extraordinary circumstances.

The Authority, like other administrative agencies and the courts, may enunciate a new rule of law without reopening previously decided cases and retroactively applying the new law. To do so would have chaotic results. The determination as to whether the new law will be applied retroactively to closed cases is based upon evaluation of the circumstances involved in each situation and consideration of a number of factors, including the effects of allowing relitigation. See Chevron Oil Co. v. Huson, 404 U.S. 97, 106-09 (1971); Linkletter v. Walker, 381 U.S. 618 (1965); Warring v. Colpoys, 122 F.2d 642 (D.C. Cir.), cert. denied, 314 U.S. 678 (1941); Department of the Treasury v. FLRA, 707 F.2d 574 (D.C. Cir. 1983), remanding National Treasury Employees Union and Department of the Treasury, Internal Revenue Service, 8 FLRA 136 (1982).

As to Case Nos. 0-AR-711 and 0-AR-772, we find that the Agency has not established any extraordinary circumstances in its motion for reconsideration which would warrant disturbing the finality of the awards of the Arbitrators and the decisions of the Authority resolving the disputes involved. This is particularly true in view of the fact that the statutory grievance arbitration system mandates a high degree of deference to arbitration awards and to finality of arbitration in dispute resolution. See General Services Administration and American Federation of Government Employees, AFL-CIO, 18 FLRA No. 52 (1985). The fact that the Authority's decisions in Case Nos. 0-AR-711 and 0-AR-772 may be inconsistent with the subsequent decision in Sequoia and Kings Canyon is not such an extraordinary circumstance as to warrant either waiving the expired time limit for filing a motion for reconsideration or reopening these closed cases.3/

3/ This case is distinguishable from Office of Personnel Management and American Federation of Government Employees, Local 32, AFL-CIO, 17 FLRA 21 (1985). In that case, the Authority declined to find that the agency had committed an unfair labor practice when it failed to comply with an arbitration award concerning the termination of a probationary employee. The Authority had previously denied the agency's exceptions to the award. However, based on a subsequent court decision, the Authority essentially determined that the grievance was not grievable or arbitrable as a matter of law and, therefore, that the arbitrator lacked jurisdiction to even consider the matter.

IV. DECISION

For the above reasons, the Agency's motion for reconsideration is denied.

Issued, Washington, D.C., December 19, 1986.

J. L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL LABOR RELATIONS
BOARD UNION

Union

and

Case No. 0-NG-900

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
AND THE BOARD

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of a single Union proposal. We find this proposal to be negotiable.

II. Background

The Union in this case filed three unfair labor practice charges against the Agency. In the first charge, filed concurrently with this appeal, the Union alleged that management had bargained in bad faith when it refused to negotiate over a proposal similar to the one under review here. The second and third charges, filed subsequent to this appeal, alleged that violations of section 7114(b)(4) of the Statute occurred when the Agency refused to furnish the names and addresses of employees in two units represented by the Union. In each instance, the Union elected to have the dispute processed under unfair labor practice procedures first.

In each case, the Authority's Regional Office declined to issue a complaint. The first charge was dismissed by the Regional Director because the dispute was not appropriate for processing under unfair labor practice procedures. The second and third complaints were dismissed by the Regional Director on the basis that the information sought was readily available from other sources, and, therefore, the Agency's refusal to provide home addresses did not violate the Statute. After the refusals to issue complaints were sustained on appeals to the General Counsel, the Union asked that we resume processing this negotiability appeal.

III. Union Proposal

> The Agency shall furnish the [Union] National President, the Washington District Vice President, and the Washington Local President, on an annual basis, a list of employees in the units to include: name; mailing address; position title; grade; Agency E.O.D.; and date of last promotion. The foregoing will be prepared as of December 31 each year and delivered by the end of February of each year.

A. Positions of the Parties

The Agency contends that disclosure of unit employees' home addresses is prohibited by law, specifically the Privacy Act of 1974. The Agency also points out that the Union has other "effective, expeditious ways" of communicating with the employees it represents. In light of this fact, the Agency contends that the "routine use" exception to the Privacy Act is inapplicable to this dispute.

While acknowledging that our decision in Farmers Home Administration Finance Office, St. Louis, Missouri, 19 FLRA No. 21 (1985) involved a dispute nearly identical to the one in this case, the Union asserts that "the Authority, upon reconsideration, will reverse itself." In asserting this position, the Union contends that because employees actually have little privacy interest in their home addresses the Authority incorrectly denied the release of bargaining unit employees' names and addresses to the Union.

B. Analysis and Conclusion

Both parties agree that the question before us in this case is whether the release of bargaining unit employees' home addresses to the Union is a negotiable matter. They also concede that our decision in Farmers Home Administration governs the dispute here. In the original decision in that case, it was held that the disclosure of employees' names and home addresses was prohibited by the Privacy Act.[1/]

The union in that case and the unions in other cases in which the Farmers Home Administration precedent was followed petitioned for court review of the Authority's decisions. In the course of litigation on appeal, it became apparent that the question of whether unions were entitled to unit employees' names and home addresses under the routine use exception of the Privacy Act, 5 U.S.C. § 552a(b)(3), had not been examined previously. Although that question had been raised before the Authority, it had not been addressed in the Farmers Home Administration decision. Consequently, remand was requested and granted in that case and two others presenting the same issue.

In our decision on remand, Farmers Home Administration Finance Office, St. Louis, Missouri, 23 FLRA No. 101 (1986), we held that release of bargaining unit employees' names and home addresses to the union is not prohibited by law. In that decision we noted, among other things, that the Office of Personnel Management has defined one routine use of Federal employees' personnel records as disclosure of information they contain to officials of a certified representative when relevant and necessary to the union's representational responsibilities. Thus, we found that disclosure of names and home addresses was within the "routine use" exception to the Privacy Act. In reaching the conclusion that release of the information was within the duty to bargain, we also stated that "the mere existence of alternative means of communication is insufficient to justify a refusal to release the information."[2/]

[1/] Privacy Act of 1974, 5 U.S.C. § 552a (1982).

[2/] Farmers Home Administration Finance Office, St. Louis, Missouri, Decision and Order on Remand, 23 FLRA No. 101 (1986), slip op. at 9.

In our decision on remand we found that the union's written request for unit employees' names and home addresses did not have to be supported by an explanation of the reasons for the request, as is usually required by section 7114(b)(4 of the Statute. In making that finding we stated, at page 8 of the decision:

> In our view, an exclusive representative's need for the names and home addresses of the bargaining unit employees it is required to represent is so apparent and essentially related to the nature of exclusive representation itself, that unlike requests for certain types of other information, an agency's duty to supply names and home addresses information does not depend upon any separate explanation by the union of its reasons for seeking the information.

Thus, we concluded that the release of names and home addresses of bargaining unit employees to the union is not prohibited by law, is necessary for the union to fulfill its duties under the Statute and meets the other requirements of section 7114(b)(4).

Based on our decision on remand in *Farmers Home Administration*, the disclosure of the type of information sought by the Union in this case is not barred by law and is, in fact, essentially related to a union's ongoing representational responsibilities. Consequently, the proposal in this case which also seeks release of unit employees' home addresses is negotiable. *See also National Federation of Federal Employees, Local 1655 and Adjutant General of Illinois*, 24 FLRA No. 1 (1986).

We also note that while section 7114(b)(4) obligates an agency to furnish an exclusive representative with information, to the extent not prohibited by law, necessary for the bargaining process, no provision of the Statute precludes the parties from negotiating contractual provisions requiring release of information which is otherwise not unlawful. *See National Treasury Employees Union and Department of Energy*, 22 FLRA No. 12 (1986).

IV. Order

The Agency must upon request (or as otherwise agreed to by the parties) bargain concerning the disputed Union Proposal.[3]

Issued, Washington, D.C. December 30, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

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[3] In finding the disputed proposal to be within the duty to bargain, we make no judgment on its merits.

24 FLRA No. 89

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND
ATMOSPHERIC ADMINISTRATION
NATIONAL MARINE FISHERIES
SERVICE, NORTHEAST REGION

Activity

and

Case No. 1-CU-50002

INTERNATIONAL ORGANIZATION
OF MASTERS, MATES AND PILOTS
(IOMMP), AFL-CIO

Labor Organization

DECISION AND ORDER

I. Statement of the Case

This case is before the Authority at this time for review of the Regional Director's Decision and Order dismissing the petition for clarification of unit filed by U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, Northeast Region (the Activity). The Activity sought to clarify a bargaining unit of permanent part-time Foreign Fisheries Observers to include a larger group of assertedly unrepresented temporary intermittent observers. The Regional Director dismissed the Activity's petition on the ground that the requested unit was inappropriate. The Activity filed an application for review of the Regional Director's Decision with the Authority. The Activity contended that review should be granted because a substantial question of law or policy is raised, i.e., that the Regional Director's Decision did not rely on Authority precedent.

The Authority granted the application for review under section 2422.17(c)(1) of the Authority's Rules and Regulations based on a determination that a substantial issue of law or policy existed because of the absence of Authority precedent in the matter. A supplemental brief was filed by the International Organization of Masters, Mates and Pilots, AFL-CIO (the IOMMP). The Authority finds that as the temporary intermittent Foreign Fisheries Observers have the same conditions of employment as the permanent part-time observers they have been included in the unit represented by IOMMP on the date each employee was hired.

II. Facts

On January 15, 1981, the IOMMP was certified as the exclusive bargaining representative of a unit of all regular and regular part-time Foreign Fisheries Observers of the Activity. The observers are involved in monitoring foreign fishing operations in the Fishery Conservation Zone located in the Northwest Atlantic Ocean and in collecting data from foreign fishing vessels in connection with the Department of Commerce's fisheries research program. The work is performed by the observers on board foreign fishing vessels in three-week deployments during which the observers work 12 to 16 hour days. When the program began in 1977, the Activity hired observers on a permanent intermittent basis. As such, they received career status but none of the benefits accorded to regular permanent Federal employees. The observers received pay only for periods of time actually spent on deployments. In 1979, the Activity converted the observers from permanent intermittent status to permanent part-time status. Thereafter, the observers were regularly scheduled to work one day per week in the Activity's office in addition to their deployments aboard the foreign vessels. As a result, they became eligible for all Federal employee benefits.

As of the date of the representation election on January 7, 1981, the Activity employed 12 permanent part-time observers and no temporary intermittent observers. In June 1981, partly for reasons of cost, the Activity began hiring observers exclusively on a temporary intermittent basis. At the time of the hearing, the Activity employed 24 temporary intermittent observers and 8 permanent part-time observers. Temporary intermittent observers are appointed for one calendar year, but may be extended for an additional three years. At the end of four years, they are terminated. All observers are initially hired at the GS-5 level and can progress to a journeyman level of GS-9. All observers: (1) share common supervision, performance plans, and working conditions; (2) perform the same duties while deployed on foreign fishing vessels; (3) are compensated for their travel and per diem expenses at the prevailing rate; and (4) rotate equitably through the assignment list and receive about the same number of assignments per year. As already indicated, each assignment lasts about three weeks.

The one-year collective bargaining agreement between the IOMMP and the Activity which was entered into in January 1984 and has since expired did not refer to temporary intermittent observers although some had been hired at the time. The record indicates that the temporary intermittent observers were not mentioned in the contract because at that time there was a strong chance that the observer function would be contracted out and the Activity believed that the temporary intermittent observers would be hired by the private contractor when their work was contracted out. There have been no grievances filed by temporary intermittent observers under the negotiated procedure contained in the agreement, nor is there any evidence that any temporary intermittent observer has ever allotted dues to, been a member of, or otherwise been represented by the IOMMP. The temporary intermittent observers enjoy none of the Federal employee benefits of the permanent part-time observers and are not regularly scheduled to work one day per week in the Activity's office.

On August 7, 1985, the Activity filed its clarification of unit petition seeking to clarify the existing unit to include the temporary intermittent observers. The IOMMP opposed the Activity's petition. However, the IOMMP stated during the course of the hearing that it was not opposed to representing the temporary intermittent observers as a separate unit.

III. Regional Director's Decision

The Regional Director dismissed the Activity's petition. The Regional Director found that while under applicable Authority precedent there were many factors present which would support a finding that the temporary intermittent observers had become part of the existing unit through accretion, the temporary intermittent observers outnumber the permanent part-time observers by approximately 3 to 1 and there is no evidence that the temporary intermittent observers have ever been represented by the IOMMP. The Regional Director further noted that the Authority has never addressed the propriety of adding a larger group of unrepresented employees to a smaller unit by means of a clarification of unit. Relying on private sector case law, Renaissance Center Partnership, 239 NLRB 1247 (1979) and Gould-National Batteries, 157 NLRB 679 (1966), the Regional Director concluded that accretion of the temporary intermittent observers to the certified unit without benefit of a self-determination election was unwarranted.

IV. Positions of the Parties

The Activity contends that there is no dispute that the temporary intermittent observers share a clear community of interest with the permanent part-time observers and that their inclusion will promote both effective dealings and the efficiency of Agency operations. The Activity argues that the two private sector cases cited by the Regional Director are inapposite as there was no attempt in the present case by the Activity to deny the temporary intermittent observers the right of self-determination. The Activity contends that the temporary intermittent observers were not in existence as a unit when the IOMMP was certified and that the reason they were not mentioned in the collective bargaining agreement was because of the understanding at the time of negotiations that their functions eventually would be contracted out.

The IOMMP argues that to allow the temporary intermittent observers to accrete into the unit would result in the following consequences: (1) it would place the temporary intermittent observers in a bargaining unit with employees whose interests are antagonistic to their own, insofar as there is some competition among employees for deployments on vessels; (2) it would require IOMMP to represent persons it did not seek to represent and who had not requested representation; (3) it would deprive the temporary intermittent observers of their right to select a bargaining representative; and (4) it would require the IOMMP to represent and/or negotiate for a unit in which three-fourths of the employees were persons whose virtually every term and condition of employment was a matter reserved by management by virtue of section 7106 of the Statute.

V. Analysis

We find in agreement with the Regional Director that the Activity's petition should be dismissed. However, we reach that conclusion for different reasons. The Regional Director addressed the issue raised by the Activity's petition in a traditional accretion case context. We disagree with that reasoning. In light of the record described above, we find that since the temporary intermittent observers shared a community of interest with the permanent part-time observers from the time they were hired, they were included in the unit from the beginning of their employment.

The record establishes that all of the observers: (1) are initially hired at the GS-5 level and can progress to a journeyman level of GS-9; (2) share common supervision, performance plans, and working conditions; (3) perform the same duties while deployed on foreign fishing vessels; and (4) are compensated for their travel and per diem expenses at the prevailing rate. The record also indicates that the temporary intermittent observers have a reasonable expectancy of future employment as most of them work for up to four years. The only difference between the permanent part-time observers and the temporary intermittent observers is that the permanent part-time observers enjoy Federal employee benefits because they work one day a week in the Activity's office. It would seem that this difference will become less significant as the number of permanent part-time observers decrease by attrition since the Activity is no longer hiring observers in that classification and the unit will be composed of only temporary intermittent observers. The IOMMP argues that inclusion of the temporary intermittent observers into the unit with the permanent part-time observers would cause friction between the groups because of the collective bargaining agreement provision which requires the Activity to give priority on deployment to permanent part-time observers. The Authority finds no merit in this argument as the collective bargaining agreement has expired and a new provision concerning deployments could be negotiated to cover the temporary intermittent observers.

In summary, we find that temporary intermittent observers were included from the date of their hiring as part of the unit represented by IOMMP which included the permanent part-time observers. Separate units of these employees would be inappropriate as they perform the same job functions under identical working conditions and under the same supervision.

VI. Conclusion

Since the temporary intermittent observers were included in the unit with the permanent part-time observers from the beginning of their employment, the Activity's petition seeking to clarify the established unit to include the temporary intermittent observers is moot and is dismissed on that basis.

ORDER

The petition filed in Case No. 1-CU-50002 is dismissed.

Issued, Washington, D.C., December 30, 1986.

J. L. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

Jean McKee
Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, NATIONAL GSA COUNCIL
(No. 236), LOCAL 1497

Union

and

Case No. O-NG-1190

GENERAL SERVICES ADMINISTRATION
REGION 3

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of four proposals. The Union made the proposals in response to an Agency-initiated change in the competitive area for employees in the Baltimore/Fort Meade area. The Agency, which had previously maintained one competitive area including employees assigned to Fort Meade and other Baltimore area posts of duty, proposed to establish a separate competitive area for employees located at Fort Meade.

II. Procedural Issues

The Agency raises two procedural grounds which it contends present bases for dismissal of the Union's petition. They are:

1) The dispute is moot in the face of the execution of a national agreement; and

2) the petition is untimely.

As to the first issue, the Agency claims that the national agreement now covers the general subject area involved in the petition. The Union contends that the terms of the national agreement do not foreclose bargaining at the local level on the proposals contained in the petition. As to the second issue, the Agency asserts that the petition was not timely filed in relation to a written declaration of nonnegotiability which the Agency had given the Union, without having been requested to do so. The Union counters that the petition was timely in relation to its written request to the Agency for an allegation of nonnegotiability.

For the following reasons, these arguments do not present a basis for dismissing the petition. Whether local negotiations on the proposals are permitted under the terms of the parties' national agreement cannot be resolved in this decision. The record in this case fails to provide any basis for substantiating the Agency's assertions. Further, to the extent that there are factual issues in dispute between the parties concerning the duty to bargain in the specific circumstances of this case, these issues may be raised in other appropriate proceedings, such as grievance and arbitration procedures. See, for example, American Federation of Government Employees, AFL-CIO, Local 2736 and Department of the Air Force, Headquarters 379th Combat Support Group (SAC), Wurtsmith Air Force Base, Michigan, 14 FLRA 302, 306 n.6 (1984).

As to the timeliness question, the written allegation of nonnegotiability from which the Agency measures the timeliness of the petition was not in response to a written request by the Union. An unrequested allegation of nonnegotiability offered by an agency does not trigger the time limits for the filing of a negotiability appeal. Upon receipt of an unrequested allegation a Union has the option of filing a timely appeal at that point. It may, however, choose to continue bargaining, request an allegation at a later time and file a timely appeal based on that allegation. See, for example, International Brotherhood of Electrical Workers, AFL-CIO, Local 121 and Department of the Treasury, Bureau of Engraving and Printing, Washington, D.C., 10 FLRA 198 (1982).

III. Union Proposal 1

> A competitive area is the Baltimore Standard Metropolitan Area.

A. Positions of the Parties

The Agency argues that this proposal is nonnegotiable because it would prescribe the competitive area for employees not in the Union's bargaining unit as well as for those who are. The Union concedes this effect but asserts that it results from the OPM reduction-in-force (RIF) regulations which establish criteria for defining competitive areas, not because the Union intends to achieve this result. The Union also argues that, in any event, this effect is not grounds for finding the proposal nonnegotiable. Finally, it contends that the proposal is negotiable as an "appropriate arrangement" under section 7106(b)(3) of the Statute.

B. Analysis and Conclusions

The competitive area defined by this proposal would include, among others, employees in bargaining units represented by unions other than the one in this case. In view of this circumstance this proposal is to the same effect as that addressed in American Federation of Government Employees, Local 32, AFL-CIO and Office of Personnel Management, 22 FLRA No. 49 (1986), petition for review filed sub nom. American Federation of Government Employees, Local 32 v. FLRA, No. 86-1447 (D.C. Cir. Aug. 11, 1986). In that decision the Authority held that because the proposal would directly determine conditions of employment for nonunit employees the agency had no obligation to bargain over it. For the reasons discussed in that case, this proposal is not within the duty to bargain.

We turn now to the Union's claim that Proposal 1 is an "appropriate arrangement" under section 7106(b)(3) of the Statute. Section 7106(b)(3) expressly applies only when management is exercising one of the management rights set out elsewhere in section 7106. See American Federation of Government Employees, Local 1546 and Department of the Army, Sharpe Army Depot, Lathrop, California, 19 FLRA No. 118, slip op. at 4 (1985), remanded sub nom. American Federation of Government Employees, AFL-CIO v. FLRA, No. 85-1689 (D.C. Cir. Nov. 17, 1986). In this case, Proposal 1 is nonnegotiable because it directly determines conditions of employment of nonbargaining unit employees and not because it interferes with an enumerated management right. Thus, the Union's claim that Proposal 1 is an "appropriate arrangement" cannot be sustained.

IV. Union Proposal 2

> Management and employees have the right to unilateral movement between the Baltimore Area.
>
> A. With any unilateral movement in the Baltimore Area, the employer agrees to give the employee forty-five (45) days advance notice.

A. Positions of the Parties

The parties agree that there is no dispute as to the portion of the proposal involving a requirement to give advance notice. The Agency contends that the meaning of the remainder of the proposal is unclear but that if read literally it would allow "management and employees" the right to be reassigned whether or not the Agency approved the move. So interpreted, it claims the proposal is not within the duty to bargain because it would extend to nonunit employees--"management"--and it would interfere with management's rights under section 7106(a)(2)(A) and (B) to assign employees, assign work and to determine the personnel by which agency operations shall be conducted. The Union describes the remainder of the proposal as entitling employees who have been affected by a RIF to "preference" to a vacancy once the employer has decided to fill the position. It intimates that the proposal is similar to that addressed in American Federation of Government Employees, AFL-CIO, Local 2782 and Department of Commerce, Bureau of the Census, Washington, D.C., 14 FLRA 801 (1985), enforced sub nom. American Federation of Government Employees, Local 2782 v. FLRA, 803 F.2d 737 (D.C. Cir. 1986).

B. Analysis and Conclusions

The Union's explanation of the proposal--that it seeks preference in filling vacancies for employees affected by a RIF--does not correspond to the wording of the proposal which is, in our view, extremely vague. In American Federation of Government Employees, AFL-CIO, Local 1858 and Department of the Army, U.S. Army Missle Command, Redstone Arsenal, Alabama, 10 FLRA 440 (1982) (Union Proposal 5) the Authority dismissed a petition as to a proposal which was not sufficiently specific and delimited to provide a basis upon which to determine its negotiability. In that case the purpose and effect of the proposed language was not sufficiently clear to permit a determination as to whether its negotiation would be consistent with applicable laws and regulations. Likewise, the purpose and effect of this proposal are not clear enough to permit us to assess its impact on the management rights with which the Agency asserts it interferes. In view of this we have no basis on which to make any judgment as to its negotiability. We find, therefore, that the Agency has no obligation to bargain over it.

If the Union were to present a proposal reflecting its stated intent of obtaining "preference" for employees affected by a RIF in filling vacancies, the following decisions would be relevant to determining whether that proposal would be negotiable:

1) Bureau of the Census, 14 FLRA 801 (1985), cited above, in which the Authority found that a proposal which would require an agency to select qualified repromotion eligibles in filling bargaining unit vacancies was an appropriate arrangement under section 7106(b)(3). However, because the proposal conflicted with a Federal Personnel Manual (FPM) provision requiring preservation of management's right to select from other appropriate sources, it conflicted with a Government-wide rule or regulation and was nonnegotiable.

2) National Association of Government Employees, Local R14-87 and Kansas Army National Guard, 21 FLRA No. 4 (1986), where the Authority found that a proposal similar to that in Bureau of the Census was within the duty to bargain as an appropriate arrangement under section 7106(b)(3). The FPM provision at issue in Bureau of the Census did not apply to the employees involved in this case.

3) American Federation of Government Employees, AFL-CIO, Local 2782 and Department of Commerce, Bureau of the Census, Washington, D.C., 6 FLRA 314 (1981), where the Authority found that a proposal which required only consideration as opposed to selection of repromotion eligibles for vacancies was negotiable as an appropriate arrangement. A proposal limited to consideration did not conflict with the above-mentioned FPM requirement.

V. Union Proposal 3

> If there should be a reduction-in-force (RIF) in the Baltimore Area, it would be management's responsibility to see that all employees involved who need a security clearance and who are qualified be given such clearance.

A. Positions of the Parties

The Agency asserts that this proposal is nonnegotiable for several reasons. The Agency contends that this proposal is integrally related to Proposal 1 which seeks to incorporate Fort Meade into the same competitive area as Baltimore. Thus, it claims further that, if Proposal 1 is nonnegotiable and the Agency's establishment of a separate competitive area for Fort Meade stands unchallenged, this proposal is moot. The Agency also asserts that the National Security Agency (NSA) has responsibility for top secret clearances required for those GSA employees located at Fort Meade who are assigned to work at NSA and that the Agency has no authority over the matter. As to those clearances for which it does have responsibility, it contends that this proposal infringes on its management right to determine its internal security practices by subjecting its decisions on granting security clearances to arbitral review. Finally, it contends that decisions to deny or revoke security clearances are reserved exclusively to agencies under the terms of Executive Order No. 10450.

The Union asserts that the proposal is limited to requiring the Agency to take whatever administrative actions are necessary to facilitate the processing of security clearances for those employees needing them as a result of RIF actions. It states that the proposal is intended to neither infringe upon the Agency's rights to determine qualifications for clearances nor to require that employees be given clearances.

B. Analysis and Conclusions

The Union's stated intent that the proposal is limited to requiring only that the Agency facilitate the security clearance process by performing necessary administrative requirements is compatible with the language of the proposal. We adopt that interpretation of the proposal for purposes of this decision. Because the proposal does not require the Agency to grant a security clearance to an employee and leaves to the Agency's discretion the determination of which employees are qualified for clearance, we find that it does not interfere with the Agency's right to determine its internal security practices. In view of the proposal's limited scope, we reject the Agency's argument that it would impinge upon any discretion the Agency, arguably, may have under Executive Order 10450. As to those security clearances which are within the responsibility of NSA, we find that the Agency is obligated to bargain to the extent that it has discretion, even if its discretion is limited to making recommendations to NSA. *See* *American Federation of State, County and Municipal Employees, AFL-CIO and Library of Congress, Washington, D.C.*, 7 FLRA 578 (1982) (Union Proposals XI-XIII), *enforced sub nom.* *Library of Congress v. FLRA*, 699 F.2d 1280 (D.C. Cir. 1983). For these reasons, we find that Union Proposal 3 is within the duty to bargain. In so finding we note, contrary to the Agency's claim, that we do not regard this proposal as necessarily "moot" in view of our disposition of Union Proposal 1. Based on the record, we cannot conclude that the proposal is solely relevant to those employees moving from other Baltimore posts of duty to Fort Meade. Because it does not appear from the record that all employees currently assigned to Fort Meade are subject to uniform security clearance requirements, we cannot rule out the possibility that the proposal might apply to employees already at Fort Meade who are not currently required to have a particular security clearance.

VI. Union Proposal 4

The FLRA Members disagree over the negotiability of this proposal. The majority opinion is on page 8 of this decision; Chairman Calhoun's dissent is on page 11

VII. Order

The Agency shall upon request, or as otherwise agreed to by the parties, negotiate over Proposal 3.[1] The Union's petition is dismissed as to Proposals 1 and 2.

Issued, Washington, D.C., December 30, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

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[1] In finding this proposal negotiable, we make no judgment as to its merits.

Union Proposal 4

The Union proposes that a Core Area (Shops) be set up for those GSA employees unable to secure or [who] lose their clearance.

Majority Opinion

A. Positions of the Parties

The Agency argues, as it did with respect to Proposal 3, that this proposal is integrally related to Proposal 1 and is moot if Proposal 1 is nonnegotiable. It also argues that this proposal interferes with its rights under section 7106(a)(2)(A) and (B) and 7106(b)(1) to assign employees, to assign work, to determine personnel by which Agency operations shall be conducted, and to determine the numbers, types and grades of employees or positions assigned to any organizational subdivision, work project or tour of duty. The Union asserts that, for some employees, a security clearance is required because of the location of the employee's worksite and not because of the duties of the employee's position. It describes the proposal as requiring the Agency to establish a nonsecure worksite for employees in those circumstances who lose or cannot obtain a security clearance. It asserts that the proposal is an appropriate arrangement for employees involved in a RIF who could be eligible for assignment to positions which, as just described, do not in and of themselves require security clearances.

B. Analysis

The Authority has long held that the right under section 7106(a)(2)(A) to assign employees includes retention of discretion to determine the qualifications necessary to do the work as well as such job-related individual characteristics as judgment and reliability. American Federation of Government Employees, AFL-CIO, and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 FLRA 603, 613 (1980), enforced sub nom. Department of Defense v. FLRA, 659 F.2d 1140 (D.C. Cir. 1981), cert. denied sub nom. American Federation of Government Employees v. FLRA, 455 U.S. 945 (1982). In our view, the Agency's requiring a security clearance is an exercise of this discretion. The proposal would effectively infringe upon that discretion in that it would require the Agency to accommodate and retain employees who did not meet this qualification. Consequently, the proposal would interfere with the Agency's right to assign employees.

Given the Union's explanation that the proposal is limited to those circumstances where it is the location of the employee's worksite as opposed to the actual work which results in the need for a security clearance, we do not conclude that it would require the Agency to redesign the duties of positions. In view of this we reject the Agency's assertion that the proposal interferes with its rights to assign work or determine the personnel by which agency operations are conducted. Compare American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 5 FLRA 83 (1981), in which the Authority found that a proposal which was limited to determining which employees would perform their regular duties in a different location did not interfere with management's rights to assign employees or to assign work. Also in view of the limited scope of the proposal, the Agency's contention that the proposal would directly affect its discretion to make work assignments and, consequently, would interfere with its right under section 7106(b)(1) to determine numbers, types and grades of employees or positions assigned to any organizational subdivision, work project or tour of duty cannot be sustained.

Having determined, however, that the proposal would interfere with management's rights, we must decide whether the proposal is an appropriate arrangement within the meaning of section 7106(b)(3). In National Association of Government Employees, Local R14-87 and Kansas Army National Guard, 21 FLRA No. 4 (1986), the Authority stated that in making such determinations it would first ascertain whether a proposal is intended to compensate for, or address the adverse effects on employees of the exercise of management rights. If this determination is in the affirmative, we then would judge whether the proposal would interfere with management's rights to an excessive degree.

First, the proposal would apply to employees who are eligible for a reassignment in the context of a RIF which may entail a change in their security clearance requirements. It therefore appears designed to address potential adverse effects flowing from the RIF.[2] Second, RIFs are not within the control of employees and have a significant negative impact on them. *See, for example, National Association of Government Employees, Local R14-87 and Kansas Army National Guard*, 21 FLRA No. 4 (1986). By allowing some employees who lack security clearances to either continue their employment at the Agency's Fort Meade operations or to be reassigned there in lieu of more drastic actions, such as termination, the proposal could significantly ameliorate the adverse effects of the RIF. Moreover, the Union has stated the proposal is limited to those instances where the need for a security clearance is based solely on the location of the worksite and has no relationship to the duties of the job. The Agency has not explicitly controverted the Union's contention that these circumstances exist at Fort Meade. In view of this very limited intended meaning and applicability of the proposal, we find that the proposal's negative impact on the management right is limited. Given the significant potential benefits accruing to employees contrasted with the limited negative effects on the management rights, we find that, on balance, the record does not establish that the proposal would excessively interfere with the Agency's right. It therefore is negotiable as an appropriate arrangement under section 7106(b)(3) of the Statute.

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[2] We reject the Agency's argument that this proposal is moot if Union Proposal 1 is not within the duty to bargain. This proposal could still be relevant even if reassignment actions in a RIF are limited to the Fort Meade area (as would be the effect of the Agency's proposed change in the competitive area) inasmuch as it appears that there may be varying needs as to security clearances at that location.

VII. Order

The Agency shall upon request, or as otherwise agreed to by the parties, negotiate over Proposal 4.[3]

Issued, Washington, D.C., December 30, 1986.

Henry B. Frazier III
Henry B. Frazier III, Member

Jean McKee
Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

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[3] In finding this proposal negotiable, we make no judgment as to its merits.

Dissenting Opinion of Chairman Calhoun

I agree with the majority that Proposal 4 interferes with the Agency's right to assign employees. In my view, the proposal also interferes with the Agency's right to assign work under section 7106(a)(2)(B).

In National Federation of Federal Employees, Local 943 and Department of the Air Force, Keesler Technical Training Center, Keesler Air Force Base, Mississippi, 19 FLRA No. 113 (1985), Proposal 2 concerned employees who were unable to perform their regular duties because of illness or injury but who were able to remain in a duty status. The proposal required the agency to "assist employees in finding assignments compatible with their medical condition if such a position is available, and vacant," or to temporarily tailor their regular duties to their medical limitations. The Authority stated that because the proposal would require the agency to redesign the duties of the position, the proposal directly interfered with the agency's right to assign work. Id. slip op. at 3.

Proposal 4 in this case would require the Agency to redesign the positions and possibly create new positions so that they could be filled by employees who do not have security clearances. While the actual duties of the position might not change, as in Keesler, the nature and qualification requirements of the position would be altered as a result of the proposal. Further, in addition to changing the position, the Agency would, of course, be required to assign work to the employees in those positions. For these reasons, I find that Proposal 2 directly interferes with the Agency's right to assign work.

I also disagree with the majority's holding that the proposal is an appropriate arrangement. Although the proposal would ameliorate the adverse effects on employees of a reduction in force, the situation involved in this case is quite different, in my view, from other situations involving RIFs. As I stated in National Treasury Employees Union and Department of Energy, 24 FLRA No. 52 (1986), for example, a proposal providing a hiring freeze on the filling of vacancies for which there were eligible bargaining unit employees during a RIF was negotiable as an appropriate arrangement under section 7106(b)(3) of the Statute. In that case, the proposed arrangement would benefit employees by "ensuring that employees who would otherwise be separated because of a RIF are placed in vacant positions for which they are eligible before the Agency seeks outside applicants." *Id.* slip op. at 7.

In the instant case, by contrast, the affected employees are those who are unable to obtain or who lose security clearances, possibly because of their action or inaction. Accordingly, Proposal 2 would require the Agency to reshape positions to retain employees who do not satisfy previously existing qualification requirements. Further, by requiring the Agency to establish a worksite in an unsecured area, the proposal could, depending upon the proximity of the unsecured worksite to the secured one, entail the movement or purchase of equipment and the reassignment of supervisory and/or management personnel.

On balance, I conclude that the benefit to affected employees is outweighed by the harm to the Agency's rights. *See National Association of Government Employees, Local R14-87 and Kansas Army National Guard*, 21 FLRA No. 4 (1986). Therefore, I find that the proposal excessively interferes with the exercise of management's rights and is nonnegotiable.

Dated at Washington, D.C., December 30, 1986.

Jerry L. Calhoun, Chairman

24 FLRA No. 91

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 987

Union

and Case No. O-NG-1309

DEPARTMENT OF THE AIR FORCE
WARNER ROBINS AIR LOGISTICS CENTER
ROBINS AIR FORCE BASE, GEORGIA

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federa Service Labor-Management Relations Statute (the Statute). Th case concerns the negotiability of a Union proposal that Robins Air Force Base "allow Gate 12 (North end of Base) to remain operational on the current hours scheduled." We find that the proposal is not negotiable.

II. Positions of the Parties

The Agency states that, following the sharply increased terrorist activity beginning in the late 1970's, the Air Force began to tighten the security of its installations in order to better safeguard and protect its facilities, aircraft and employees. Gate 12 is located at the North end of the runway, and the Agency states that its closure is intende to prevent access to Robins AFB's flight line area from outside the base. The Agency argues that (1) the decision to close Gate 12 is an exercise of management's right to determine its internal security practices under section 7106(a)(1) of the Statute, and that such determination is not negotiable; and (2) the proposal violates management's right to determine the numbers, types, and grades of employees assigned to a work project under section 7106(b)(1).

The Union states in its Petition for Review that the intent of its proposal is "to continue the manning of Gate 12 for the entrance and exit for personnel working in the SAC [Strategic Air Command] Location." According to the Union, before the Agency decided to close the gate, the gate had been staffed before work and at the end of the day shift "to allow employees easier access to their remote area jobs and also to be able to leave the area, without traveling some 3-1/2 miles through the heavy traffic on the main-stream of the work force." Union's Petition for Review. The Union did not provide any arguments in its petition for review supporting the negotiability of the proposal, nor did it file a reply brief.

III. Analysis

An agency's right to determine its internal security practices includes the right to determine what is necessary to safeguard its physical property against internal or external risks. See, for example, National Federation of Federal Employees, Local 29 and Department of the Army, Kansas City District, U.S. Army Corps of Engineers, Kansas City, Missouri, 21 FLRA No. 32 (1986) (Union Proposal 1), petition for review filed sub nom. National Federation of Federal Employees, Local 29 v. FLRA, No. 86-1308 (D.C. Cir. May 28, 1986). In this case, the Agency has determined that it is essential to the security of the flight line on the base to close Gate 12. The Union's proposal that the gate be kept open negates management's internal security plan, and therefore violates the Agency's right to determine its internal security practices. See American Federation of State, County and Municipal Employees, AFL-CIO, Local 2910 and The Library of Congress, 15 FLRA 612 (1984) (in which the Authority found that a union proposal that a roof door be accessible to employees by key effectively negated an essential component of the Agency's plan to secure its physical property, and was therefore outside the duty to bargain). Moreover, the proposal does not concern the impact and implementation of the Agency's decision to close the gate; rather, it would require the Agency to bargain over the substance of its decision.

IV. Conclusion

We find that the Union's proposal directly interferes with the Agency's right to determine its internal security practices and is therefore outside the duty to bargain. In view of this finding, it is unnecessary to pass on the Agency's further argument with regard to management's right to determine the numbers, types and grades of its employees.

V. Order

The petition for review is dismissed.

Issued, Washington, D.C. December 30, 1986.

J. L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF COMMERCE
BUREAU OF CENSUS

Respondent

and Case No. 3-CA-50375

EDWARD HANLON

Charging Party/Individual

DECISION AND ORDER

I. Statement of the Case

This case comes before the Authority as the result of exceptions filed by the General Counsel to the Administrative Law Judge's Decision in which he found that the Respondent did not violate section 7116(a)(1) of the Federal Service Labor-Management Relations Statute (the Statute). The Respondent filed an opposition to the General Counsel's exceptions. The issue in this case is whether Respondent violated section 7116(a)(1) of the Statute by refusing to grant the Charging Party, Mr. Edward Hanlon, permission to set up employee-owned tripods during nonwork time in nonwork areas in order to disseminate information related to a labor organization. For the reason stated below, we find no merit to the complaint.

II. Facts

The facts are fully set out by the Judge and are not in dispute. On June 7, 1985, the Charging Party, by memorandum addressed to the Respondent's Labor Relations Officer, sought permission to set up employee-owned tripods in four nonwork areas in Respondent's Suitland, Maryland facilities for the purpose of displaying messages to other unit employees concerning a labor organization. The memorandum noted that the request was being made by and for unit employees, but was not made by or as an agent for any union. The Charging Party's request was denied by the Respondent by a memorandum also dated June 7, 1985. The Respondent has granted permission to use tripods in nonwork areas only to agency officials, and to recognized or established employee groups, including recognized labor organizations, to disseminate information relating to group-sponsored activities. Requests by individuals have not been approved and no past practice has developed which would extend such a right to individual employees.[1]

III. Administrative Law Judge's Decision

The Judge found that the Charging Party sought permission to utilize the Respondent's space or facilities for the purpose of setting up temporary displays and that the facts in the case were clearly distinguishable from situations involving employee rights to distribute literature to other employees in nonwork areas during nonwork times. As the tripods were to be used for the purpose of posting notices, the Judge determined that the Charging Party's request was analogous to a request to use agency bulletin boards. Relying in part on the Authority's decision in Federal Election Commission, 20 FLRA No. 3 (1985), and Department of Defense, Department of the Air Force, 31st Combat Support Group, Homestead Air Force Base, 13 FLRA 239 (1983), the Judge reasoned that since employees do not have a statutory right to post material on agency bulletin boards or a general statutory right to post material in other public areas on agency property, the Charging Party in this case did not have a statutory right to set up tripods on the Respondent's premises. The Judge specifically rejected the contention of the Counsel for the General Counsel that as a bargaining unit employee the Charging Party had a right under section 7102 of the Statute to set up tripods in the Respondent's nonwork areas.

The Judge also rejected the contentions of the Counsel for the General Counsel that a right had developed as a result of past practice which entitled the Charging Party to set up the tripods and that the Respondent had discriminatorily refused the Charging Party's request. Noting that the record in the case reflected just the opposite, the Judge found that it was clearly established that individual use of tripods had always been prohibited as a matter of policy under rules promulgated by the Respondent. The Judge found that the

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[1] According to the Judge, the record in this case suggested that occasionally an individual employee might be allowed, for humanitarian reasons, to "put up" material. The Respondent granted permission to one employee to post information in the facility concerning the employee's missing niece. The Judge noted, however, that there was no indication in the record that any individual employee was permitted to erect a tripod on the Respondent's premises.

Respondent's denial of the Charging Party's request was based on the need to prevent indiscriminate use of tripods on its premises by 3,000 individual employees. The Judge found that among the relevant factors considered by the Respondent were the best utilization of its facilities, services and management resources. The Judge concluded that there was no evidence that the Respondent's policy was applied to the Charging Party in a discriminatory manner.

The Judge also noted that the Respondent was concerned about its obligations under the Statute to American Federation of Government Employees, Local 2782, the exclusive representative of all the employees in the bargaining unit, and the possible violation of sections 7114(a)(1) and 7116(a)(8) of the Statute if it granted the Charging Party's request on behalf of the group of employees mentioned in his memorandum. The Judge concluded that those circumstances reflected an additional legal basis for denying the Charging Party's request. The Judge concluded that the Respondent did not act improperly in refusing to grant the Charging Party's request and, therefore, that denial of the request did not constitute an unfair labor practice.

IV. Positions of the Parties

The General Counsel contends that the Judge erred in finding that the case involves the right of employees to use agency facilities and that the setting up of employee-owned tripods constitutes use of agency facilities. The General Counsel argues that the case involves the right of employees to engage in solicitation or the distribution of literature during nonwork time in nonwork areas which are protected activities under section 7102 of the Statute. The General Counsel also contends that the Judge should have found the Respondent's rules governing tripod use to be overly broad and discriminatory.

In opposition, the Respondent argues that the Judge correctly concluded that the case involves issues of the right of an agency to restrict the use of its facilities and the right of an individual employee to use those facilities rather than an issue of an employee's right under section 7102 to solicit and to distribute literature. Further, the Respondent argues, in agreement with the Judge, that the Respondent's rule governing the use of tripods was proper and was not applied disparately to the Charging Party. The Respondent also contends that the Judge correctly found that section 7114(a)(1) of the Statute provided additional legal justification for the Respondent's denial of the Charging Party's request and notes the absence of an exception to this finding and conclusion of the Judge. The Respondent requests that the Authority adopt the Judge's decision in its entirety and dismiss the General Counsel's exceptions.

V. Analysis

In agreement with the Judge and based on his rationale, we find that the Respondent was under no obligation to grant the Charging Party's request and that its refusal was not violative of section 7116(a)(1) of the Statute. While section 7102 of the Statute gives each employee the right to form, join, or assist a labor organization, individual employees do not have any general statutory right to post material in public areas on agency property. Authorization to post material is a matter of agency discretion. For example, Federal Election Commission and Homestead Air Force Base, cited by the Judge. In adopting the Judge's findings and conclusions, we note particularly that: (1) it was not shown that the Charging Party was acting in other than an individual capacity; (2) setting up tripods for the display of notices involves the use of agency facilities for that purpose; (3) there was no past practice of allowing individuals to use agency facilities or space to set up tripods for any purpose; (4) on the contrary, the use of tripods by individuals was prohibited as a matter of published policy; (5) the policy was not applied to the Charging Party in a discriminatory manner; and (6) the Charging Party's request was denied based on the Respondent's determination as to the best use of its facilities, services and management resources and concern for its obligations under the Statute to the exclusive representative of the employees in the unit.[2] In view of those circumstances, we

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[2] As the Judge found: "The record clearly established that the Respondent has, upon receipt of applications, extended the right to use tripods in nonwork areas only to agency officials, and to recognized or established employee groups, including recognized labor organizations, to disseminate information relating to group sponsored activities. . . Requests made by individuals have not been approved, and no past practice has developed which would extend such a right to individual employees[.]" Decision of the Judge at 5-6. Further, the Respondent could not lawfully permit a labor organization other than the exclusive representative to obtain access to its facilities for solicitation purposes unless that labor organization had achieved equivalent status. See Department of Health and Human Services, Health

(Continued)

find that the Charging Party did not have a right to set up tripods on the Respondent's premises and the Respondent did not commit an unfair labor practice by denying him permission to do so.

VI. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge made at the hearing, finds that no prejudicial error was committed, and therefore affirms the rulings. The Authority has considered the Judge's Decision, the positions of the parties and the entire record, and adopts the Judge's findings, conclusion and recommended Order. We therefore conclude that the Respondent did not violate section 7116(a)(1) of the Statute by refusing to grant permission to the Charging Party to set up tripods during nonwork time in nonwork areas in order to disseminate information related to a labor organization.

ORDER

The complaint in Case No. 3-CA-50375 is dismissed.

Issued, Washington, D.C., December 31, 1986.

J L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

(Continued)

Care Financing Administration 18 FLRA No. 59 (1985), *remanded on other grounds*, *American Federation of Government Employees v. FLRA*, 793 F.2d 333 (D.C. Cir. 1986).

(24 FLRA No. 92)

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DEPARTMENT OF COMMERCE
BUREAU OF CENSUS

Respondent

and

Edward Hanlon — Case No. 3-CA-50375

Charging Party/
Individual

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES
LOCAL 2782, AFL-CIO

Amicus Curiae

C. J. Schmidt, Esquire
For the Respondent

Patricia E. Dratch, Esquire
Bruce D. Rosenstein, Esquire
For the General Counsel

Mr. Edward Hanlon
For the Charging Party

William J. Stone, Esquire
Dale Jacobson, Esquire
For *Amicus Curiae*

Before: LOUIS SCALZO
Administrative Law Judge

DECISION

Statement of the Case

This case arose as an unfair labor practice proceeding under the provisions of the Federal Service Labor-Management Relations Statute, 92 Stat. 1191, 5 U.S.C. § 7101, *et seq*. (hereinafter referred to as "the Statute"), and the Rules and Regulations issued thereunder.

The complaint as amended at the hearing alleged that the Department of Commerce, Bureau of Census, violated Section 7116(a)(1) of the Statute on or about June 7, 1985, by reason of Respondent's refusal to grant the Charging Party, Mr. Edward Hanlon, permission "to set up a tripod during nonwork time in nonwork areas in order to disseminate information related to a labor organization."[1] It was further alleged that Respondent's refusal was in derogation of rights guaranteed by Section 7102 of the Statute.

American Federation of Government Employees, Local 2782, AFL-CIO, the exclusive representative of employees working at the Bureau of the Census moved to intervene as a party at the commencement of the hearing on the ground that activity of Mr. Hanlon's depicted in the complaint was actually designed as an attack upon Local 2782's representational status, and further that the Activity was pursued on behalf of the National Treasury Employees Union (NTEU), a rival labor organization. Local 2782 has a collective bargaining agreement with the Respondent. It will be in effect until July 19, 1987, thus preventing NTEU or any other labor organization, from raising a question concerning representation and obtaining access to Respondent's facilities for purposes of union solicitation, in the absence of NTEU's acquiring equivalent status by the timely filing of a petition raising a question concerning representation. Local 2782 alleged further that Mr. Hanlon, along with some other bargaining unit members, were working in concert with NTEU in an effort to displace Local 2782 as the exclusive representative.

Under the provisions of 5 C.F.R. § 2423.15 of Authority regulations any party may move to intervene in an unfair labor practice proceeding provided sufficient ground to demonstrate "involvement" in the proceeding is established. Division of Military and Naval Affairs, State of New York (Albany, New York), February 11, 1981, Authority Order Denying Motion to Intervene and Granting Permission to Submit Arguments as *Amicus Curiae*, Case No. 1-CA-334.

Counsel representing Local 2782 acknowledged that he did not feel that the proof would show that Mr. Hanlon was employed by NTEU, or that Mr. Hanlon was actually legally associated with NTEU. On the contrary, he indicated that Mr. Hanlon's activity represented "volunteerism," and that if allowed to intervene, Local 2782, would not call witnesses to establish evidence of a relationship between Mr. Hanlon and NTEU. He stated, that if allowed to intervene counsel merely intended to participate as an observer (Tr. 7).

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[1] The complaint was amended to correct a typographical error which indicated that Mr. Hanlon filed the charge herein on behalf of a union rather than as an individual employee.

Counsel representing the General Counsel opposed the motion on the ground that the complaint did not involve Section 7116(a)(3) issues relating to protection of a union's exclusive status; and further that the allegations of the complaint posed narrowly limited issues relating to the exercise of "individual rights" under Section 7102 of the Statute. Counsel representing the General Counsel advised that no proof would be introduced to show that Mr. Hanlon was an agent or a representative of NTEU.

Counsel representing the Respondent argued in support of the motion to intervene, but indicated that apart from Mr. Hanlon's obvious involvement on behalf of NTEU, there was no evidence tending to establish that Mr. Hanlon was operating in a representative capacity on behalf of NTEU.

On the basis of the foregoing, the motion to intervene was denied on the ground that there was no showing of Local 2782's "involvement" in the case within the meaning of 5 C.F.R. § 2423.15. However, Local 2782 was granted permission to file a brief as amicus curiae.

The brief filed by Local 2782 following the hearing seeks reconsideration of the denial of the motion to intervene, and a reopening of the record for the purpose of allowing Local 2782 to introduce evidence relating to Mr. Hanlon's relationship with NTEU. Counsel notes that full party status for appeal purposes is justified at this stage of the proceedings by reason of the record developed during the course of the hearing. However, the nature of the evidence which counsel would now introduce is not described, nor does counsel supply any basis for the absence of an intent to introduce such evidence when the motion to intervene was first made at the hearing. Furthermore, he does not indicate why he did not renew his motion to intervene and reopen before the close of the hearing.

Counsel representing Local 2782 argues in his post-hearing brief that evidence in the record establishes a formal relationship between Mr. Hanlon and NTEU. However, an examination of the record failed to establish that Mr. Hanlon was in fact representing NTEU or fronting for NTEU. Although evidence adduced gives rise to inquiry concerning Mr. Hanlon's relationship with NTEU, it falls far short of a showing that Mr. Hanlon was acting as a representative of NTEU, or that he was acting in any capacity other than that of an interested bargaining unit member. For the reasons outlined the motion to intervene and reopen the record is denied.

Based upon the entire record herein, including exhibits, arguments made during the hearing, and briefs filed by the parties, I make the following findings of fact, conclusions and recommendations.[2]

Findings of Fact

Basis of Complaint

The complaint is based upon the Respondent's denial of a June 7, 1985 memorandum request addressed by Mr. Hanlon to Ms. Colleen Woodard, Respondent's Labor Relations Officer. The request sought permission to set up employee owned tripods[3] in four nonwork areas in Respondent's Suitland, Maryland facilities for the purpose of displaying "messages to other unit employees about Section 7102 activities." (Jt. Exh. No. 1).[4] The memorandum notes that the request submitted was being "made by and for unit employees," but explained that it was "not made for, by or as agent of any Union, Union entity, Union organization, Union Local or Union National." The request asked that the "employees" seeking permission be allowed to set up their tripods beginning on Monday morning June 10, 1985, so that other unit employees might be informed "about Section 7102 meetings" scheduled to be held that week.

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[2] Counsel representing the Respondent moved to correct errors in the hearing transcript. Under authority reflected in 5 C.F.R. § 2423.19(r), the proposed corrections are approved.

[3] The tripods referred to were devices regularly used for displaying posters and announcements.

[4] Among other things Section 7102 of the Statute provides that "[e]ach employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right . . . (emphasis added)."

The June 7th request was received by Ms. Woodard from Mr. Hanlon on the same date (Tr. 60). The request was routed to her office because the Labor Relations Office had sole authority to consider such requests relating to union activities (Tr. 69). Her denial, also dated June 7, 1985 was not received by Mr. Hanlon until Monday, June 10th. Ms. Woodard made an unsuccessful effort to effect delivery of the denial on Friday, June 7th but Mr. Hanlon was not then available (Jt. Exh. No. 2, Tr. 23-24, 30, 60).

Although Mr. Hanlon's request sought permission for use of the tripods commencing on Monday morning, June 10th, and although he had not received Respondent's reply, he prematurely erected a tripod on Sunday evening, June 9th in one of the four locations designated in his memorandum request (Tr. 24, 30-31). The message posted on the tripod announced "a meeting for employees to attend . . . to discuss union activities and to discuss among ourselves reaffiliation with another union." (Tr. 28). At about 8:30 A.M. on Monday, June 10th, the tripod was confiscated by a representative of Respondent's Security Office (Tr. 24-25). It was returned to Mr. Hanlon only after he agreed in writing to refrain from using the tripod again without permission.

Respondent's Policy Relating to Tripod Use

Ms. Woodard's denial of the request was based upon the difficulty posed in extending the right to erect tripods to some 3,000 employees located at Respondent's facilities in Suitland, Maryland; upon Respondent's conclusion that the best use of Bureau facilities, services, and management energy would not be served by extending the right to erect tripods to such a large group of individuals; and upon elements relating to the possibility of Respondent having to deal with similar requests from such a large group of employees (Tr. 68-70). A key factor entering into Respondent's evaluation of the request related to existing policy extending such a right only to a limited number of recognized employee organizations, as distinct from individual requests for such permission (Tr. 89, 91).

The record clearly established that the Respondent has, upon receipt of applications, extended the right to use tripods in nonwork areas only to agency officials, and to recognized or established employee groups, including recognized labor organizations, to disseminate information relating to group sponsored activities (Tr. 43, 68). Requests made by individuals have not been approved, and no past practice has developed which would extend such a right to individual employees (Tr. 68, 89-90.[5]

The authority to permit the use of tripods within the context of the policy outlined was conferred upon Ms. Woodard, the Respondent's Labor Relations Officer, insofar as the policy related to tripod use by labor organizations or in connection with labor relations matters (Tr. 49-50, 56-57). Implementation of the policy outlined and the processing of requests for tripods other than those dealing with labor relations matters has been handled by Respondent's Employees Services and Performance Management Branch (Tr. 42-43). The latter office deals with a wide range of identifiable employee groups (other than labor organizations) having occasion to utilize tripods to disseminate information.

Respondent's policy concerning the use of tripods in the manner sought herein is not set out specifically in rules or regulations. However, it is based in large measure on a provision reflected in Chapter K 15 of the Bureau of Census Administrative Manual, entitled "Use of Bulletin Boards and Distribution of Printed Material" (R. Exh. No. 1; Tr. 44-45, 90-91). Section 4.02 of the manual provides:

> 4.02 Control
>
> The Chief, Administrative Services Division in consultation with the Chief, Personnel Division shall maintain necessary controls to assure compliance with this directive. Material which is unauthorized or improperly posted will be removed from official boards or any other place within Census occupied space. Improper posting of materials will be made the subject of appropriate disciplinary action (emphasis added).

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[5] At one point the record did suggest that occasionally an individual might "for humanitarian reasons" be allowed to "put up" material. This was illustrated by the example of a woman whose niece was missing, and who wanted "to put some material up on that subject." (Tr. 55). There was no indication that this category related to grants of authority to individuals to erect tripods on Respondent's premises. The testimony merely referred to Respondent's authorization to post relevant information concerning the missing niece, and made no reference to the utilization of tripods by individuals seeking to disseminate information.

Respondent considered tripods a form of bulletin board, and relied upon language in Section 3, of Chapter K 15 to limit tripod use to "employee groups" only (Tr. 51-52). That is, the right to post on official bulletin boards was, under Chapter K 15, limited to employee groups or employee organizations. This rule was extended and made applicable to tripod use (Tr. 53, 62).

Respondent's limitation of the right to use tripods to employee groups included recognized employee groups meeting specific requirements set out in Department of Commerce Administrative Order 202-707, entitled "Voluntary Employee Organizations," and labor organizations (Tr. 43, 52-53). A witness testifying for Respondent stated:

> . . . we can't allow willy-nilly any person who wishes to do something to put things anyplace in the Bureau . . . . (Tr. 52).

Mr. Hanlon's request did not emanate from a previously recognized employee group or from a labor organization having a legal right to set up tripods, and did not for these reasons, meet Respondent's established criteria.

Hanlon's Relationship with NTEU

As of the date of the hearing Mr. Hanlon was merely a member of Local 2782. He held no official position with Local 2782 (Tr. 23). Mr. Hanlon had, in the past, served as President of Local 2782, and as the Local's Chief Steward.[6] Ms. Woodard's testimony reflects an effort on the part of the Respondent to ascertain the precise relationship between Mr. Hanlon and NTEU inasmuch as Respondent's efforts to facilitate Mr. Hanlon's activity on behalf of NTEU could conceivably be characterized as an unfair labor practice within the purview of 7116(a)(3) if Mr. Hanlon's conduct involved fronting for NTEU in an NTEU effort to unseat Local 2782.[7]

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[6] Mr. Hanlon testified that he has been named in impeachment proceedings at the national level of the American Federation of Government Employees, and that as of the date of the hearing these proceedings were pending against him (Tr. 32).

[7] By memorandum dated May 30, 1985 addressed to Ms. Woodard, Mr. Hanlon announced that he and other bargaining unit employees would, over the course of several weeks, be

(continued)

The record did disclose some contact between Mr. Hanlon and an NTEU organizer (Tr. 61, 63), and also indicated an effort on the part of Mr. Hanlon to show an NTEU film (R. Exh. No. 4; Tr. 64-65). The proof adduced evidences Mr. Hanlon's strong interest in enhancing NTEU's credibility among Local 2782's bargaining unit members. However, the proof falls far short of establishing that Mr. Hanlon was "fronting," for NTEU, or that he was actively working as an agent or representative of NTEU in efforts to introduce NTEU to bargaining unit members.

Conclusions and Recommendations

The specific conduct condemned in the complaint relates to Respondent's refusal to grant Mr. Hanlon permission "to set up a tripod during nonwork time in nonwork areas in order to disseminate information related to a labor organization." It does not deal with the question of whether or not literature may be distributed during non-work time in nonwork areas. The complaint, as phrased, is limited solely to the issue of whether Mr. Hanlon had a legal right to erect a tripod in certain nonwork areas for the purpose of disseminating "information related to a labor organization."

7/ (continued)

distributing literature in nonwork areas during nonwork time (R. Exh. No. 5; Tr. 70-71). Ms. Woodard responded on May 31, 1985, noting Mr. Hanlon's activity on behalf of NTEU, and Respondent's obligations under the Statute to prevent solicitation by any labor organization without equivalent status (R. Exh. No. 6; Tr. 71-72). Ms. Woodard's reply sought clarification of Mr. Hanlon's intent with regard to literature distribution, and clarification of his relationship with NTEU (Tr. 73).

In two separate memorandums dated June 5, 1985, Mr. Hanlon disavowed association with any union, and stated that he and other bargaining unit members were exercising their Section 7102 rights as individuals only, and not as representatives of any union (R. Exh. Nos. 3 and 4; Tr. 61, 63-64).

As a result of the June 5th memorandums, Respondent treated Mr. Hanlon's June 7, 1985 request as a request filed by an individual (Tr. 67-68, 73). The record as a whole tends to reflect that Respondent continued to question and distrust Mr. Hanlon's representations concerning his relationship with NTEU, as Respondent continued inquiry into the subject even after receipt of the June 5th memorandums (Tr. 74).

Proof adduced reflected that the request actually transmitted to the Respondent was broader in nature than the request described in the complaint. On behalf of other employees, Mr. Hanlon sought permission to set up an undisclosed number of employee-owned tripods in four nonwork areas. The exact size and description of the tripods in question was not disclosed in the record. However, it did appear that the equipment described was portable in nature, and had the capability of being easily erected and taken down. There is no indication of the exact amount of space that one tripod would occupy. There is no indication of the total amount of space, or location of the space, that all of the tripods in issue would have occupied, nor is the period of such occupation reflected. It is apparent that the request is a petition for agency space to be utilized for the purpose of erecting tripods designed to be used for the posting of notices.

The Authority has made it clear that the use of agency facilities by a union is a privilege and not a right. United States Nuclear Regulatory Commission, 6 FLRA 18 (1981); Arkansas Army National Guard, 1 FLRA 877 (1979); Headquarters, 2750th Air Base Wing, U.S. Air Force, Wright-Patterson Air Force Base, Ohio, 1 FLRA 864 (1979). This case is clearly one involving a request for permission to use specific areas for the purpose of erecting temporary displays, or in other words it is a specific request to utilize agency space or facilities exclusively for a particular purpose. As noted, the facts are clearly distinguishable from those in involving the right of employees to hand out literature to fellow employees in nonwork areas during nonwork time.

In Department of Defense, Department of the Air Force, 31st Combat Support Group, Homestead Air Force Base, 13 FLRA 239 (1983), the Authority held that neither a union nor an employee has a statutory right of access to agency bulletin boards, and that permission to post material may be subject to restrictions or limitations.[8] The Charging Party's efforts to obtain the use of tripod space for posting notices is analogous to an effort to obtain permission to use an employee's bulletin boards, and thus the rule enunciated would be applicable here.

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[8] However, the Authority has ruled that the right of access to a bulletin board may arise from a negotiated agreement or a "past practice" allowing the union or individuals to post material on bulletin boards. Department of Labor, Office of Workers' Compensation Programs, Branch of Special Claims, 11 FLRA 77 (1983). See also U.S. Department of Justice, Federal Prison System, Federal Correctional Institution, Milan, Michigan, 17 FLRA 1023 (1985).

It is not contended here that the right to use tripods emanates from a collective bargaining agreement. Instead it is asserted that the right stemmed from past practice, and it is contended that Respondent discriminatorily refused to permit such use. However, the record developed reflects the very opposite. Rules administered by the Respondent operated to deny individuals the right to erect tripods, but allowed agency officials and recognized employee groups to use tripods under close supervision. It was clearly established that individual use of tripods has always been prohibited.

It cannot be contended that the rules promulgated and administered were discriminatory, and it would not be possible to agree with the contention of the General Counsel and Charging Party that all bargaining unit employees have a legal right to erect tripods in Respondent's nonwork areas by reason of rights conferred by Section 7102.

Denial in this case was based upon the need to avoid indiscriminate erection of tripods on Respondent's premises by individuals, a practice which if allowed would have led, in Respondent's opinion, to requests emanating from a group of about 3,000 employees, as compared with the much smaller number of recognized employee groups. Elements relating to the best use of Bureau facilities, services and management energy were considered relevant factors in the denial, and, as noted, there was no evidence that the policy described was implemented by the Respondent in a discriminatory manner.

In Federal Election Commission, 20 FLRA 20 (1985), the Authority followed the legal principle established in Department of Defense, Department of the Air Force, 31st Combat Support Group, Homestead Air Force Base, and extended the rule to the posting of material in other public areas on agency property. The following language reflects the Authority's position:

> Since unions and employees do not have a statutory right to post material on bulletin boards, it follows that there is no general statutory right to post material in other public areas on agency property. Thus, access to bulletin boards or to other public areas for posting material remains a matter within an agency's discretion to authorize, either by way of provision in the parties' negotiated agreement or as a matter of past practice in allowing such access to its employees.

The record herein reflects no basis for concluding that the Respondent acted improperly in refusing to grant the Charging Party's request, and thus, denial of the request did not constitute an unfair labor practice.[9] Accordingly, it is recommended that the Authority issue the following Order pursuant to 5 C.F.R. § 2423.29.

ORDER

IT IS HEREBY ORDERED, that the complaint in Case No. 3-CA-50375, be, and hereby is, dismissed.

Louis Scalzo
LOUIS SCALZO

Dated: March 19, 1986
Washington, D.C.

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[9] Neither the General Counsel, nor the Charging Party contended that Mr. Hanlon was seeking permission on behalf of a recognized employee group. It was contended throughout that Mr. Hanlon sought permission as an individual employee seeking to exercise § 7102 rights. This contention is reflected in the complaint wherein it is alleged that Mr. Hanlon's June 7, 1985 request was submitted as an individual. However, as previously described, the actual language used in the request indicates that the Hanlon request was filed on behalf of Mr. Hanlon and a group of bargaining unit employees for the purpose of obtaining certain concessions from the Respondent concerning tripod use on Respondent's premises. That is, Mr. Hanlon was actively seeking to establish rights for himself, and he was representing other unnamed bargaining unit employees in their efforts to obtain similar rights. Since Local 2782 held the position of exclusive representative, the Respondent was obligated to recognize only Local 2782 in such matters, and could not, without violating Sections 7114(a)(1) and Section 7116(a)(8), enter into negotiations or dealings with Mr. Hanlon on behalf of the group of bargaining unit employees referred to in Mr. Hanlon's memorandum. The provisions of Section 7114(a)(1) of the Statute specifically provide that only the exclusive representative may act on behalf of bargaining unit employees in such matters. These circumstances reflect an additional legal basis for Respondent's denial of the Charging Party's request.

24 FLRA No. 93 (24 FLRA No. 93)

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, .D.C.

U.S. DEPARTMENT OF HEALTH AND
HUMAN SERVICES, SOCIAL SECURITY
ADMINISTRATION

Agency

and Case No. O-AR-1148

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL No. 547

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the award of Arbitrator Lawrence Kanzer filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations. The Agency filed an opposition.*/

II. BACKGROUND AND ARBITRATOR'S AWARD

The grievance in this case concerns the Agency's suspension of the grievant, a Claims Representative, for 12 days for his tardiness in processing the files of several claimants in dire need of compensation for medical care, medicine, housing and food. When the parties could not resolve the dispute as to the appropriateness of this disciplinary action, the matter was submitted to arbitration.

The Arbitrator initially examined the duties and the distribution of work among the grievant and his fellow Claims Representatives (CRs). Thereafter, the Arbitrator compared the CRs' disciplinary records.

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*/ The Agency's opposition was untimely and, therefore, will not be considered further herein.

First, he found that the most important duty of a CR was to note that a claim had been filed and to secure the basic information, for example the claimant's name, required on Form SSA-450-SI (Form 450). Once this was done, the claim could then be processed. Second, the Arbitrator determined that the grievant had not been assigned an inequitable number of claims to be processed. Finally, the Arbitrator, after comparing the discipline records of two CRs introduced by the grievant, found that neither CR had violated the Form-450 input requirement to the extent that the grievant had violated it.

After examining the positions of the parties, the Arbitrator specifically determined that the grievant was grossly negligent in failing to input various dire need claims into the processing system by completing a Form 450. Since 7 or 8 of the dire need claimants were thereby denied timely benefits due to the grievant's omission, the Arbitrator found that the discipline imposed was warranted and for just cause. Accordingly, he denied the grievance.

III. POSITION OF THE UNION

In its exceptions the Union contends that the Arbitrator's award is deficient because (1) he failed to conduct a fair hearing by refusing to hear material and relevant evidence which the Union wished to present and (2) the award is based on nonfacts. Regarding the first contention, the Union asserts that the Arbitrator terminated the hearing prematurely in order to catch a plane. It claims that the two hours allotted for the Union's presentation did not permit it to call all of its witnesses and the Arbitrator thereby failed to consider all of the Union's relevant and material evidence. In support of this exception the Union cites the Authority's decisions in National Border Patrol Council and National Immigration and Naturalization Service Council and U.S. Department of Justice, Immigration and Naturalization Service, 3 FLRA 400 (1980); Veterans Administration, Regional Office and Service Employees International Union, Local 556, AFL-CIO, 5 FLRA 463 (1981); San Antonio Air Logistics Center, Kelly Air Force Base, Texas and American Federation of Government Employees, AFL-CIO, Local 1617, 6 FLRA 419 (1981); U.S. Department of Labor and American Federation of Government Employees, Local No. 644, NCFLL, 12 FLRA 639 (1983).

As to the contention that the award is based on a nonfact, the Union asserts that the Arbitrator failed to consider documentation offered by the Union which challenged the Agency's position that the grievant was responsible for tallying and inputting claims. The Arbitrator, however, based his award on the finding that the grievant was responsible for tallying or initiating the claims into the processing system. To support this exception the Union cites the Authority's decision in Mid-America Program Service Center, Social Security Administration, Department of Health, Education, and Welfare and Local No. 1336, American Federation of Government Employees, AFL-CIO, 5 FLRA 264 (1981).

IV. ANALYSIS AND CONCLUSIONS

Although we will find an arbitration award deficient if it is established that the arbitrator failed to conduct a fair hearing by refusing to hear pertinent and material evidence, for example, National Border Patrol Council and National Immigration and Naturalization Service Council and United States Department of Justice, Immigration and Naturalization Service, 3 FLRA 400 (1980), the Union does not establish that the award is deficient on this basis. The Authority in cases involving a question as to the fairness of a hearing has recognized that an arbitrator has considerable latitude in the conduct of the hearing. Id. at 404. The fact that the arbitrator conducted the hearing in a manner which one party finds objectionable does not support a contention that the arbitrator denied that party a fair hearing. See American Federation of Government Employees, Local 1917, AFL-CIO and U.S. Immigration and Naturalization Service, 13 FLRA 68 (1983). Moreover, the cases cited by the Union do not stand for the proposition that a mere assertion that an arbitrator excluded testimony or documents dictates a finding that an arbitrator failed to conduct a fair hearing and that an award is, therefore, deficient. Rather, as noted by the Authority in National Border Patrol Council, also cited by the Union, Federal courts find arbitration awards deficient as denying a fair hearing primarily when an arbitrator's challenged rulings had precluded consideration of all the pertinent and material evidence. In this case, the specific instances cited by the Union where the Arbitrator limited the number of witnesses heard or the documentation entered into the record reveal nothing more than an attempt by the arbitrator to control the conduct of the hearing by insuring that such testimony as was offered by witnesses or documentation entered into the record was relevant and material to the resolution of the issues before him and not unduly repetitive. The Union has not substantiated in what manner the Arbitrator's exclusion of the testimony or documentation it asserts was improper demonstrates that the Arbitrator was biased or partial and, consequently that he failed to conduct a fair hearing. Thus, since this exception is totally devoid of any substantiation, it provides no basis for finding the award deficient. U.S. Army Corps of Engineers, New Orleans District and National Federation of Federal Employees, Local No. 1124, 13 FLRA 70 (1983).

Regarding the Union's second exception, the Authority will find an award deficient when it is demonstrated that the central fact underlying the award is concededly erroneous and in effect is a gross mistake of fact but for which a different result would have been reached. Mid-America Program Service Center, Social Security Administration, Department of Health, Education, and Welfare and Local No. 1336, American Federation of Government Employees, AFL-CIO, 5 FLRA 264 (1981). In this case, however, the Union has failed to demonstrate that the award is deficient on this ground. Thus, the Union has not demonstrated that the Arbitrator's tallying and input determinations disputed by the Union were the central facts on which the Arbitrator based his award and that they were concededly erroneous. In other words, the Union has not shown that the Arbitrator not only erred in his view of the facts but that the sole articulated basis for his award was concededly and indisputably in error. Rather, the Union's assertion that the Arbitrator erred in various respects constitutes nothing more than disagreement with the Arbitrator's reasoning and conclusions and an attempt to relitigate the merits of this dispute before the Authority. See Social Security Administration and American Federation of Government Employees, SSA, Local 1923, AFL-CIO, 7 FLRA 544 (1982).

V. DECISION

Accordingly, the the Union's exceptions are denied.

Issued, Washington, D.C. December 31, 1986

J. L. Calhoun
Jerry L. Calhoun, Chairman

Henry B. Frazier III
Henry B. Frazier III, Member

Jean McKee
Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NATIONAL FEDERATION OF
FEDERAL EMPLOYEES, LOCAL 1374

Union

and Case No. O-NG-1271

PACIFIC MISSILE TEST CENTER
DEPARTMENT OF THE NAVY

Agency

DECISION AND ORDER ON NEGOTIABILITY ISSUE

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of the underscored sentence of the following Union proposal:

> Each affected employee shall be notified of the proposed changes in his or her FLSA status. The employee will be given an opportunity to contest the accuracy of this change prior to the effective date of any change. Because the presumption contained at 5 C.F.R. § 551.203(c) is an easily rebuttable administrative presumption, once an employee has provided any argument that his or her position should be considered nonexempt, the agency must make an independent determination of the employee's status.

II. Background

This proposal arose in the context of impact and implementation bargaining in connection with Fair Labor Standards Act (FLSA) regulations, 5 C.F.R. Part 551, promulgated by the Office of Personnel Management (OPM) at 48 Fed. Reg. 49,494 (1983). These regulations modified and clarified criteria for determining a Federal employee's exemption status under the FLSA; that is, an employee's entitlement to overtime payment under the FLSA. An "exempt" employee is not entitled to overtime payment under the FLSA; such an employee is entitled, however, to overtime compensation under the provisions of the applicable Federal pay systems.

The regulations also were intended to facilitate FLSA administration in the Federal sector and to alleviate the discrepancy between OPM's exemption criteria and the criteria applicable to employees in the private sector. These regulations were involved in judicial and Congressional action which delayed implementation. See generally National Treasury Employees Union v. Devine, 733 F.2d 114 (D.C. Cir. 1984); see also American Federation of Government Employees v. Office of Personnel Management, 618 F. Supp. 1254 (D.D.C. 1985), affirmed, 782 F.2d 278 (D.C. Cir. 1986). They were later republished as proposed regulations at 50 Fed. Reg. 35,529 on August 30, 1985, and were adopted by OPM as final rules without change at 51 Fed. Reg. 7,425 (1986).

III. Positions of the Parties

The Agency contends that the underscored portion of the Union's proposal is nonnegotiable under section 7117(a)(1) of the Statute because it conflicts with a Government-wide regulation, 5 C.F.R. § 551.207,[1] which requires OPM to provide advisory opinions on agency-proposed exceptions to the presumption of exemption for specific occupations at GS-11 or above, set forth in 5 C.F.R. § 551.203(c), before such exceptions can be made by an agency.[2]

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[1] 5 C.F.R. § 551.207 provides in pertinent part:

> § 551.207 Exceptions by OPM.
>
> The Office of Personnel Management will provide advisory opinions on agency-proposed exceptions to the presumption of exemption for specific occupations at GS-11 or above (or the equivalent level in other white collar pay systems) which is specified in § 551.203(c) of this subpart. Exceptions may not be made before OPM consideration.

[2] 5 C.F.R. § 551.203(c) provides:

> § 551.203 Exceptions of General Schedule employees.
>
> . . . .
>
> (c) Except as provided in § 551.207 of this subpart, any employee properly classified at GS-11 or above (or the equivalent level in other white collar pay systems) shall be presumed to be exempt under this subpart. An agency that properly classifies an employee at GS-11 or above shall be deemed to have satisfied the burden of proof for asserting exemption.

The Union disputes the Agency's position. It contends that the Agency's position ignores the difference between the "exemption for specific occupations" and the rebuttal of the presumption with respect to a specific individual's position. According to the Union, the wording of the regulations, basic statutory FLSA principles, and OPM's past administration of the FLSA support its position that the presumption may be rebutted in individual cases without OPM's approval. Union reply brief at 2-3.

IV. Analysis

We find that the Union's proposal is outside the duty to bargain. The proposal would require "local agency officials [to] determine [without OPM approval] whether an employee has rebutted the presumption of exemption." Attachment 2 to Union's petition for review at 3. The proposal would require the Agency to make an independent determination of an employee's status under the FLSA, contrary to the requirement of 5 C.F.R. § 551.207 that such determinations be made, not unilaterally, but in consideration of and subsequent to an advisory opinion of OPM.

The regulation requires that OPM "provide advisory opinions on agency proposed exceptions to the presumption of exemption for specific occupations at GS-11 or above . . . which is specified in 5 C.F.R. § 551.203(c)," and that "[e]xceptions may not be made before OPM consideration," 5 C.F.R. § 551.207 (emphasis supplied). Section 551.203(c) provides that "[e]xcept as provided in § 551.207 . . ., any employee properly classified at GS-11 or above . . . shall be presumed to be exempt under this subpart." (Emphasis supplied.) These regulations are Government-wide regulations. See Radio Officers Union and National Oceanic and Atmospheric Administration, 19 FLRA No. 80 (1985), slip op. at 7. Considering these sections together, it is our view that any employee properly classified at GS-11 or above is presumed to be exempt unless an exception has been made pursuant to 5 C.F.R. § 551.207.

This interpretation comports with OPM's explanation of how the regulations should operate. For instance, in 50 Fed. Reg. 35,529 (1985), OPM stated:

> Under these new regulations, it is assumed that if a position is properly classified at the GS-11 or above level . . ., the position would properly be exempt under the provisions of the FLSA. However, we do recognize that there could exist rare occasions when there might be an exception to

> the presumption. For those unusual situations when an agency feels that an exception might exist, we propose a regulatory procedure for requesting a waiver (see § 551.207).
>
> . . . .
>
> After the regulations become effective, all GS-11 and above employees will be presumed to be exempt unless a waiver is granted by OPM. (Emphasis in original.)

Beyond this explanation, OPM in an earlier issuance of the Federal Register, 48 Fed. Reg. 49,494, 49,495, in responding to a comment concerning 5 C.F.R. § 551.207, stated:

> One agency disagreed with the requirement in § 551.207 that agencies not make exceptions to the presumption of exemption without prior OPM approval. We believe that this requirement for prior approval is necessary in order to assure consistency among agencies and to avoid pay and classification discrepancies.

Additionally, in the same issuance of the Federal Register at 49,494 and 49,495, OPM in responding to objections to the presumption of exemption stated:

> [T]he presumption of exemption can be appealed by either the employee or the employing agency.
>
> . . . .
>
> Although OPM does not rule out the possibility that certain positions at these grade levels [GS-11 and above] are properly nonexempt, we believe that the combination of the system for waiver requests by agencies and the FLSA administrative appeals system, will allow for the identification of these anomalies.

Based upon a reading of the regulations as a whole and noting OPM's explanatory language concerning these regulations, we conclude, contrary to the Union, that 5 C.F.R. § 551.207 is intended to govern exceptions from the presumption of exemption for all GS-11 employees and above, including individual cases, "in order to assure consistency among agencies and to avoid pay and classification discrepancies." 48 Fed. Reg. 49,495. Because the proposal would require the Agency to make an independent determination of an employee's status under the FLSA without OPM's approval pursuant to 5 C.F.R. § 551.207, it is inconsistent with the regulations. The proposal therefore is not within the duty to bargain.

V. Order

The Union's petition for review is dismissed.

Issued, Washington, D.C., December 31, 1986.

J. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

24 FLRA No. 95

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, .D.C

WARNER ROBINS AIR LOGISTICS CENTER
DEPARTMENT OF THE AIR FORCE
WARNER ROBINS, GEORGIA

Activity

and Case No. O-AR-1129

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL No. 987

Union

DECISION

I. STATEMENT OF THE CASE

This matter is before the Authority on exceptions to the award of Arbitrator Cary J. Williams filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute (Statute) and part 2425 of the Authority's Rules and Regulations. The Activity did not file an opposition.

II. BACKGROUND AND ARBITRATOR'S AWARD

The grievance in this case concerns the Activity's five-day suspension of the grievant for leaving his work area without permission and for threatening a supervisor. The dispute was submitted to arbitration on February 6, 1986. At the hearing, the Union requested a continuance because the Union representative who had prepared the case had not been able to obtain official time or leave without pay in order to present the grievant's case. The Activity opposed a continuance. It asserted that the Union had been notified well in advance, by letter dated January 24, 1986, that the usual Union representative might not be able to obtain the necessary leave and that the Union could have easily made arrangements for another representative to take his place. The Arbitrator denied the continuance as not warranted by the circumstances because the Union had ample time to make other arrangements for the grievant's representation. The grievant and Union representative, refused to participate in the hearing.

The Arbitrator then heard evidence presented by the Activity pertaining to the suspension. Noting that there was no evidence to rebut the testimony and evidence presented by the Activity, the Arbitrator found that the suspension was for just cause and denied the grievance.

III. EXCEPTIONS

The Union contends, generally, that the award is deficient because the Arbitrator held the hearing without the grievant and Union representative and thereby violated the principles of fairness and due process. As a result, it asserts that the award is deficient because it was "procured by 'ex parte'" and constituted harmful error. The Union also argues that the Activity's actions violated the parties' collective bargaining agreement and constituted an unfair labor practice under the Statute.

IV. ANALYSIS AND CONCLUSIONS

We conclude that the Union's exceptions fail to establish that the Arbitrator's award is deficient.

Although the Authority will find an arbitration award deficient if it is established that the arbitrator failed to conduct a fair hearing by refusing to hear pertinent and material evidence, for example, National Border Patrol Council and National Immigration and Naturalization Service Council and United States Department of Justice, Immigration and Naturalization Service, 3 FLRA 400 (1980), the Union does not establish that the award is deficient on this basis. The Authority has recognized that an arbitrator has considerable latitude in the conduct of the hearing, see id. at 404. The Union fails to substantiate that it was denied a fair hearing by the Arbitrator's finding that it had a reasonable opportunity to make other arrangements for an alternate Union representative to appear at the arbitral hearing. See U.S. Department of Labor and American Federation of Government Employees, Local No. 644, NCFLL, 12 FLRA 639, 641 (1983). Moreover, the award was not procured by ex parte contacts with the arbitrator since the hearing was conducted with the knowledge of the Union and its absence was by choice. Also, awards resulting from ex parte hearings have been enforced by Federal courts based upon the rationale that since the losing party had a chance to be heard and refused to participate it should not now complain that the award is invalid because it chose to stay away. *Amal. Meat Cutters & Butcher Workmen v. Penobscot Poultry Co.*, 200 F. Supp. 879 (D. Me. 1961); *see also* *Joint Board of Cloak, Skirt and Dressmakers Union v. Senco, Inc.*, 289 F. Supp. 513 (D. Mass. 1968). There is no basis upon which to conclude that the Arbitrator's denial of the continuance constituted "harmful error." This rule does not apply to suspensions for 14 days or less instituted under section 7503 and reliance on the rule in this five-day suspension case is misplaced. *Immigration and Naturalization Service and American Federation of Government Employees, Local 505*, 22 FLRA No. 70 (1986).

Finally, the Union's arguments that the Activity's actions constitute a violation of the parties' agreement and an unfair labor practice provide no basis for finding the Arbitrator's award deficient. *See* *American Federation of Government Employees, Local 3272 and Social Security Administration Areas VIII and XIV, Chicago Region, Branch Office, Holland, Michigan*, 10 FLRA 310 (1982).

V. DECISION

For these reasons, the Union's exceptions are denied.

Issued, Washington, D.C. December 31, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

*U.S. GOVERNMENT PRINTING OFFICE:1987-181-223:60003

9/ Case No. 418

**Federal
Labor Relations
Authority**

Washington, D.C. 20424

NUMBER 418 REPORT OF CASE DECISIONS December 31, 1986

UNFAIR LABOR PRACTICE CASES

24 FLRA No. 96 (December 31, 1986)

Department of Defense, Department of the Army, Fort Buchanan, San Juan, Puerto Rico and American Federation of Government Employees, Local 2614, Case No. 42-CA-40232

24 FLRA No. 97 (December 31, 1986)

Internal Revenue Service and National Treasury Employees Union, Case No. 3-CA-40436

24 FLRA No. 98 (December 31, 1986)

Department of the Treasury, Internal Revenue Service, Wichita District, Wichita, Kansas and National Treasury Employees Union. Case No. 7-CA-30514

24 FLRA No. 99 (December 31, 1986)

Department of the Air Force, Headquarters, 832d Combat Support Group, DPCE, Luke Air Force Base, Arizona and American Federation of Government Employees, AFL-CIO, Local 1547, Case No. 8-CA-50167

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Federal Labor Relations Authority

24 FLRA No. 96

DOD, Dep't of the Army, Fort Buchanan, San Juan, Puerto Rico and AFGE, Local 2614, Case No. 42-CA-40232 (Decided December 31, 1986)

SUBJECT MATTER INDEX ENTRIES

- AGENCY ULP (ALLEGED) 7116(a)(5)
  - CONDITIONS OF EMPLOYMENT
    - NOT A CONDITION OF EMPLOYMENT
- CONDITIONS OF EMPLOYMENT (C.O.E.)
  - FACTORS DECIDING WHETHER A MATTER INVOLVES A C.O.E.
    - NATURE AND EXTENT OF THE EFFECT ON WORKING CONDITIONS
      - ADEQUATE LIVING STANDARD, IMPACT ON
      - TRAFFIC AND PARKING PROBLEMS RE PRIVATE SECTOR SHOPPING
    - WHETHER MATTER PERTAINS TO BARGAINING UNIT EMPLOYEES
  - MATTERS ALLEGED TO BE A CONDITION OF EMPLOYMENT
    - NON-WORK ACTIVITIES IN NON-DUTY STATUS
      - PATRONAGE PRIVILEGES
  - PAST PRACTICE
    - CRITERIA FOR A PAST PRACTICE TO RISE TO C.O.E.
- FACILITIES, EQUIPMENT AND SERVICES
  - POST EXCHANGE
    - PRIVILEGES NOT A CONDITION OF EMPLOYMENT
- VEHICLES
  - TRAFFIC CONGESTION AND PARKING PROBLEMS, PRIVATE SECTOR
    - ALLEVIATION NOT A CONDITION OF EMPLOYMENT

STATUTE

7103(a)(14)
7116(a)(1) and (5)
7118(a)(7)

DIGEST NOTES

Although the activity had permitted its employees to use the post exchange for 18 years, the post exchange privileges did not become a condition of employment within the meaning of section 7103(a)(14). Thus when the agency's regulations were changed so as to withdraw post exchange privileges from civilian employees, the activity did not violate section 7116(a)(1) and (5) by refusing to bargain on the substance of the change. The Authority held that the privileges did affect bargaining unit employees. However, in the view of the majority of Authority Members, the nature and extent of the privileges on the working conditions of those employees was not sufficient to make the privileges a condition of employment. The privileges were not

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necessary to enable employees to sustain adequate living standards. There was an abundance of private sector shopping alternatives to the Exchange near the employees' homes and the base. Also, although by shopping at the exchange employees could avoid traffic congestion and parking problems, the alleviation of such problems by shopping at the Exchange was not of such a consequence as to raise the Exchange privileges to the level of a condition of employment. (majority opinion)

Federal
Labor Relations
Authority

24 FLRA No. 97

IRS and NTEU, Case No. 3-CA-40436 (Decided December 31, 1986)

SUBJECT MATTER INDEX ENTRIES	STATUTE
AGENCY ULP (ALLEGED) 7116(a)(5)	7116(a)(1) and (5)
CONDITIONS OF EMPLOYMENT	7118
UNILATERAL CHANGE IN CONDITIONS OF EMPLOYMENT	
DETAILS	
CONDITIONS OF EMPLOYMENT (C.O.E.) 7103(a)(14)	
NON-BARGAINING UNIT EMPLOYEES	
PROCEDURES TO IMPLEMENT DETAILS TO NON-UNIT POSITIONS	
DETAILS	
TO NON-BARGAINING UNIT POSITIONS	
IMPACT ON BARGAINING UNIT EMPLOYEES	
PROCEDURES USED TO IMPLEMENT DETAILS	
UNFAIR LABOR PRACTICES, REMEDIES FOR AGENCY VIOLATIONS	
BARGAINING ORDER	
APPROPRIATE ARRANGEMENTS AND/OR PROCEDURES	

DIGEST NOTES

The agency violated section 7116(a)(1) and (5) when it implemented a program entitled "Instructor Opportunities with Historically Black Colleges and Universities" without notifying the union of the change and affording it an opportunity to bargain over the impact and implementation of the change. Under the program, bargaining unit members were detailed to non-unit positions as instructors. While generally deemed by all to be beneficial to the career of employees selected for participation, it had the effect of removing those employees from their work with the agency for three to nine months. Given the extended nature of such absences, the Authority found it reasonable to conclude that the program could have a foreseeable impact on the workload of remaining employees as well as on the selected employees' ability to perform their duties upon return to their bargaining unit positions. Consequently, the change in conditions of employment was more than de minimis.

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24 FLRA No. 98

Federal Labor Relations Authority

Dep't of the Treasury, IRS, Wichita District, Wichita, Kansas and NTEU, Case No. 7-CA-30514 (Decided December 31, 1986)

SUBJECT MATTER INDEX ENTRIES | **STATUTE**

PROCEDURE
  RECONSIDERATION OF AUTHORITY DECISIONS
    TIME LIMITS FOR FILING A MOTION FOR RECONSIDERATION
      MOTION UNTIMELY FILED

The Authority dismissed the activity's motion to reconsider its decision of an unfair labor practice case because the motion was untimely filed.

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

Federal Labor Relations Authority

24 FLRA No. 99

Dep't of the Air Force, HQ, 832d Combat Support Group, DPCE, Luke Air Force Base, Arizona and AFGE, Local 1547, Case No. 8-CA-50167 (Decided December 31, 1986)

SUBJECT MATTER INDEX ENTRIES

- AGENCY ULP (ALLEGED) 7116(a)(8)
  - 7122(b)
- ARBITRATION PROCEDURE
  - FINALITY OF AWARD
    - AWARDS ALLEGED TO BE ILLEGAL
    - TIMELY EXCEPTIONS NOT FILED
- BACKPAY
  - NIGHT DIFFERENTIAL
  - ARBITRATION AWARDS TO WHICH TIMELY EXCEPTIONS WERE NOT FILED
- ENFORCEMENT AND COMPLIANCE
  - ARBITRATION AWARDS
    - AWARDS ALLEGED TO BE ILLEGAL
      - EXCEPTIONS TO AWARD NOT TIMELY FILED WITH AUTHORITY
    - EFFECT OF ARBITRATOR'S CLARIFICATION OF AWARD ON COMPLIANCE
    - TYPE / NATURE OF AWARD FOR WHICH ENFORCEMENT WAS SOUGHT
      - BACKPAY
- PREMIUM PAY
  - NIGHT DIFFERENTIAL
    - ENFORCEMENT OF ARBITRATION AWARD
- UNFAIR LABOR PRACTICES, PROCEDURE
  - TIME LIMITS
    - CONDUCT OCCURRING MORE THAN SIX MONTHS BEFORE FILING
      - SUSPENSION OF TIME LIMITS FOR EQUITABLE REASONS
- UNFAIR LABOR PRACTICES, REMEDIES FOR AGENCY VIOLATIONS
  - COMPLY WITH ARBITRATION AWARD
  - BACKPAY
- UNITED STATES CODE
  - 5 U.S.C. 5596 [BACK PAY ACT]
  - 5 U.S.C. 7701(g)

STATUTE

7116(a)(1), (5) and (8)
7118(a)(4)(A)
7122(b)

DIGEST NOTES

The running of the time limit to file a charge that the agency failed to comply with an arbitration award was suspended for almost a year by the Authority for equitable principles. The arbitrator awarded backpay to two employees for the loss of night

ALL ENTRIES SUBJECT TO FURTHER EDITING FOR INCLUSION IN CONSOLIDATED DIGESTS AND INDEXES.

differential due to the activity's failure to comply with the parties' collective bargaining agreement. When the activity failed to comply with the arbitrator's award, the union filed several unfair labor practice charges for non compliance, but withdrew the charges for various reasons. On one occasion, the Regional Director dismissed the charge and the General Counsel subsequently denied the appeal essentially because the activity's exceptions to the arbitrator's award were still pending before the Authority. Under these unique circumstances, the Authority determined that the activity should not escape its obligation to fully comply with the arbitrator's award.

The Authority held that the activity failed to provide backpay (night differential) called for in the arbitrator's award. Any question which the activity has as to the legality of the award should have been raised through timely exceptions filed with the Authority pursuant to section 7122(a) of the Statute. However, since the exceptions filed by the activity were untimely, the arbitrator's award was final and binding. Because the activity failed to fully comply with the arbitration award which became final and binding under section 7122(b) in the absence of timely exceptions, it violated section 7116(a)(1) and (8).

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF DEFENSE,
DEPARTMENT OF THE ARMY,
FORT BUCHANAN, SAN JUAN,
PUERTO RICO

Respondents

and Case No. 42-CA-40232

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2614

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions filed by the Respondents to the attached Administrative Law Judge's Decision. The case concerns whether the Respondents violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute by unilaterally terminating patronage privileges for civilian employees at the Post Exchange at Fort Buchanan on January 31, 1984.

II. Background

For 18 years prior to January 31, 1984, employees at Ft. Buchanan enjoyed patronage privileges at Ft. Buchanan's Post Exchange. These Exchange privileges encompassed (1) a General Store (offering items such as toiletries, jewelry, clothing, shoes, small appliances, and other household goods); (2) a Shopette (a small grocery store offering dairy and poultry products, canned goods, bread, and pet food); and (3) a dry cleaners, optical shop, watch repair shop, movie theater, and toy store.

Employees at Ft. Buchanan commonly shopped at the Exchange before and after work. This saved time in comparison to making trips to commercial facilities. The employees also avoided heavy traffic and parking problems encountered when shopping in the private sector. The record also shows that employees believed that prices were lower, and the quality of goods was higher at the Exchange.

The employees did not lack alternatives to the Exchange in the surrounding area, in the private sector, before or after the termination of their Exchange privileges. Ft. Buchanan is within the metropolitan area of San Juan, Puerto Rico, near residential developments and commercial facilities. Convenience stores, food stores, and two shopping centers are located near Ft. Buchanan. A third shopping center--Plaza Las Americas, described in hearing testimony as a huge shopping center comparable to large shopping centers in the States--is about 20 minutes from Ft. Buchanan by car. Although blue laws prohibit store operations on Sundays and after 6 p.m. on other days, the testimony shows that hours of the Exchange and the commercial facilities are about the same.

In 1982, the Department of Defense (DoD) issued a new regulation, DoD Dir. 1300.9, which placed new restrictions on the authority of military commanders to extend Exchange privileges to civilian employees in Puerto Rico. After the regulation had been implemented within the Department of Defense and the Department of the Army's chain of command, Ft. Buchanan advised the Union in November 1983 that employees' Exchange privileges at Ft. Buchanan would be terminated on January 31, 1984. The Union requested negotiations on the substance of this decision. Ft. Buchanan refused to negotiate the substance of the decision, but offered to negotiate concerning the impact and implementation of the decision. Ft. Buchanan asserted that it was precluded by the Department of the Army from negotiating over the decision to terminate the Exchange privileges. The Department of the Army asserted that negotiations on the decision were precluded by directions of the Department of Defense.

Ft. Buchanan and the Union exchanged communications on the matter and met to discuss their positions on January 12, 1984. There were no negotiations. The Union continued to insist on negotiations on the substance of the decision. Ft. Buchanan refused, offering negotiations on impact and implementation. The Exchange privileges were terminated on January 31, 1984. The Union did not seek negotiations on the impact and implementation of the decision.

III. Judge's Decision

The Judge found that Ft. Buchanan had not refused to negotiate on the impact and implementation of the decision, but that it had refused to negotiate over the decision itself. He found that the substance of the decision was within the duty to bargain because the Exchange privileges concerned employees' conditions of employment under section 7103(a)(14) of the Statute. This was based on his findings that the privileges had been offered as an inducement to employment in Puerto Rico, and that the privileges had become a condition of employment by past practice. He further concluded that negotiations on the decision were not barred by agency regulations, as no compelling need had been shown for the regulations under section 7117 of the Statute.

Finding that Ft. Buchanan's refusal to negotiate the decision was based on orders from the Department of the Army, and that the Department of the Army had acted as it had on instructions from the Department of Defense, he concluded that the complaint should be dismissed as to Respondents Ft. Buchanan and Department of the Army. However, the Judge concluded that the Department of Defense had violated section 7116(a)(1) of the Statute by its actions and recommended that it be ordered to cease and desist and to take certain affirmative action.

IV. Respondent's Exceptions

The Respondent Department of Defense excepted to the Judge's finding that no compelling need was shown for withdrawal of exchange privileges by DoD Directive 1330.9 of May 12, 1982. It excepted first to the Judge's statement that there was no evidence as to specific compelling need or reason or justification for the action. Second, Respondent DoD excepted to the Judge's statement that the congressional oversight committee had no interest or concern about exchange privileges for civilian employees in Puerto Rico.

V. Analysis

Subsequent to the Judge's Decision in this case, the Authority issued Antilles Consolidated Education Association and Antilles Consolidated School System, 22 FLRA No. 23 (1986) and Department of the Air Force, Eielson Air Force Base, Alaska, 23 FLRA No. 83 (1986), discussed by the parties and the Judge as being relevant to the disposition of this case. As here, Antilles and Eielson concerned whether Exchange privileges or similar patronage privileges were conditions of employment under section 7103(a)(14). See also Department of the Army, Fort Greely, Alaska, 23 FLRA No. 105 (1986).

In Antilles we explained the two basic factors which determine whether a matter proposed for negotiations involves a condition of employment under section 7103(a)(14): (1) Whether the matter proposed to be bargained pertains to bargaining unit employees; and (2) the nature and extent of the effect of the matter proposed to be bargained on working conditions of those employees. In Antilles we determined that the union's proposals for the creation of privileges at the agency's retail, recreational, and medical facilities did not concern conditions of employment under the second factor, because there was no showing on how the employees' access to these facilities, off the job, related to their working conditions.

In Eielson, we applied the Antilles factors and determined that the Exchange privileges, although analogous to the privileges at issue in Antilles, did concern conditions of employment under section 7103(a)(14). This conclusion was based on a showing that the employees at the isolated base in Alaska needed the Exchange privileges to maintain adequate living standards in connection with their employment there, because of the lack of reasonably convenient substitutes and the difficulties and dangers of travel in Alaska in winter months, and the Exchange privileges had been described as part of the living and working conditions in Alaska. Our decision in Ft. Greely, Alaska, 23 FLRA No. 105, which followed Eielson and which also concerned Exchange privileges, was similarly based. See also Department of the Army, Dugway Proving Ground, Dugway, Utah, 23 FLRA No. 80 (1986); U.S. Department of Justice, U.S. Immigration and Naturalization Service, 14 FLRA 578 (1984).

Our analysis of the loss of Exchange privileges in the circumstances here yields results different from the conclusions in Eielson and Ft. Greely, Alaska. The employees at Ft. Buchanan lost a convenience when their Exchange privileges were terminated. However, the record does not show that the privileges were necessary to enable employees to sustain adequate living standards. Rather, the circumstances in this case are analogous to the circumstances in Antilles, where there was no showing as to how the employees' access to the Exchange facilities related to their working conditions. Here, the record shows that there is an abundance of private sector shopping alternatives to the Exchange near the employees' homes and the base. Uncontradicted testimony suggested a belief that Exchange prices are lower; however, the record disclosed that Federal employees in San Juan receive cost of living allowances which are adjusted for benefits such as Exchange privileges.

The record also suggests increased traffic and parking difficulties connected with private sector shopping. These problems are common in large metropolitan areas in the States; we do not consider any alleviation of such problems by shopping at an Exchange to be of such consequence as to raise the Exchange privileges to the level of a condition of employment. The testimony on the comparative quality of poultry and milk products shows that employees believe that the Exchange's products are better. However, the record does not establish that the comparable private sector products create health problems. Further, based on this record, it has not been shown that Ft. Buchanan's willingness to negotiate the impact and implementation of the termination of general Exchange privileges did not include a willingness to negotiate concerning these particularized concerns.

The Judge's reliance on General Counsel Exhibit 17, in concluding that the Exchange privileges concern conditions of employment under section 7103(a)(14), is misplaced. The exhibit shows that certain employees were promised Exchange privileges in connection with their employment at Ft. Buchanan. However, this document, dated April 23, 1984, also states that Exchange privileges were not terminated for those employees who had been offered the privileges as part of their transportation agreement for employment in Puerto Rico. Therefore, this document does not support a conclusion that the Exchange privileges were conditions of employment for the employees whose Exchange privileges were terminated in January 1984.

The Judge also concluded that the Exchange privileges became conditions of employment by operation of past practice. In reaching this conclusion the Judge relied on Authority precedent which is inapposite. In our view, matters which are not conditions of employment within the meaning of section 7103(a)(14) do not become conditions of employment merely by the effect of a past practice. See Veterans Administration and Veterans Administration Medical Center, Lyons, New Jersey, 24 FLRA No. 8 (1986).

As explained in Antilles, our approach to conditions of employment issues--which we believe is consistent with prior Authority precedent--is that a party that desires to negotiate on a matter on the basis that the matter relates to conditions of employment under section 7103(a)(14) must show that the matter is pertinent to the employees' working conditions. In this case the General Counsel has not shown that the employees nonwork, patronage privileges at Ft. Buchanan's Post Exchange relate to the employees' working conditions so as to justify a determination that the Exchange privileges concern conditions of employment under section 7103(a)(14) of the Statute.

Based on our determination that Exchange privileges at Ft. Buchanan do not concern conditions of employment under section 7103(a)(14), we conclude that the Respondents were not obligated to negotiate the decision to terminate the Exchange privileges. National Weather Service, Silver Spring, Maryland, 21 FLRA No. 63 (1986). Accordingly, the compelling need issues raised here need not be addressed.*/

VI. Conclusion

The Exchange privileges at Ft. Buchanan have not been shown to be conditions of employment under section 7103(a)(14) of the Statute. Therefore, the refusal to negotiate over the decision to terminate the privileges did not constitute a violation of the Statute. Moreover, there was no refusal to negotiate on the impact and implementation of the decision. Accordingly, the complaint shall be dismissed in its entirety.

ORDER

The complaint in Case No. 42-CA-40232 is dismissed.

Issued, Washington, D.C., December 31, 1986.

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

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*/ However, noting that our disposition on the compelling need issues raised here would parallel the discussion of such issues in Eielson and Ft. Greely, Alaska, we direct the parties' attention to the discussion of such issues in those cases.

Dissenting Opinion of Chairman Calhoun

In agreement with the Judge, I find that the Exchange privileges involved conditions of employment of bargaining unit employees and that the withdrawal of those privileges constituted an unfair labor practice. I agree with the majority that under the Antilles analysis, the privileges about which the Union sought to bargain pertained to bargaining unit employees. I disagree with the majority's conclusion, however, that the second Antilles consideration is not satisfied. In my view, there is a direct connection between the privileges and the work situation and employment relationship of bargaining unit employees.

In Antilles, the Authority found that a proposal to create new privileges at the agency's retail, recreational, and medical facilities was nonnegotiable because it did not directly affect working conditions of bargaining unit employees. Subsequently, in Eielson and Ft. Greely, we found that similar privileges affected conditions of employment. We emphasized, among other things, that the privileges in the latter two cases had been continued over a long period of time and were used as inducements to accept employment in isolated locations.

I conclude that the circumstances of the privileges in the case now before us are like those in Eielson and Ft. Greely. As found by the Judge, the privileges had been enjoyed by bargaining unit employees for at least 18 years and flowed from their employment. Further, although Ft. Buchanan is not as isolated as Eielson Air Force Base or Ft. Greely, the privileges had been contractually offered as an inducement to employment in Puerto Rico. The fact that the privileges were not terminated for those employees who accepted the conditions of a transportation agreement on that basis is not dispostive, in my view, because the use of the privileges as inducements to employment evidences the relationship between the privileges and the employment situation.

Dated, Washington, D.C. December 31, 1986

J. L. Calhoun

Jerry L. Calhoun, Chairman

(24 FLRA No. 96)

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

DEPARTMENT OF DEFENSE
DEPARTMENT OF THE ARMY
FORT BUCHANAN
SAN JUAN, PUERTO RICO

Respondents

and — Case No. 42-CA-40232

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2614

Charging Party

. . . .

Sam Horn, Esquire
For Respondents Department of Defense and Department of the Army

Major Marion E. Winter, JAGC
For Respondent Fort Buchanan

Pamela B. Jackson, Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, *et seq.*[1], and the Final Rules and Regulations issued thereunder,

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[1] For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the Statute reference, *e.g.*, Section 7116(a)(5) will be referred to, simply, as "§ 16(a)(5)."

5 C.F.R. § 2423.1, et seq., concerns principally whether there was compelling need for the amendment of Department of Defense Directive 1330.9 on May 12, 1982, which terminated authority to grant Post Exchange privileges to civilian employees in Puerto Rico, there being no dispute that the decision to withdraw Exchange privileges was declared non-negotiable pursuant to § 17(a)(2) of the Statute, i.e., that the withdrawal of authority to grant Exchange privileges in Puerto Rico was governed by an agency regulation [DOD Directive 1330.9] as to which the Authority had not determined that was no compelling need. This case was initiated by a charge filed on February 21, 1984, with Region II, where it was designated as Case No. 2-CA-40232 (G.C. Exh. 1(a)) which named the "U.S. Army - Headquarters Fort Buchanan, Puerto Rico", and alleged violation of § 16(a)(1) and (5) of the Statute. By Order dated February 24, 1984, pursuant to § 2429.2 of the Regulations, this case was transferred from Region II of the Authority to Region IV of the Authority (G.C. Exh. 1(b)). An amended charge was filed on June 28, 1984, with Region IV, where the case was now designated as Case No. 42-CA-40232, (G.C. Exh. 1(c)) which named "The Department of the Army, Department of Defense, Headquarters Fort Buchanan." The Complaint and Notice of Hearing issued on August 10, 1984, and hearing was scheduled for September 18, 1984. By Order dated August 14, 1984 (G.C. Exh. 1(e)) the hearing was rescheduled for October 16, 1984, pursuant to which a hearing was duly held on October 16, 1984, in San Juan, Puerto Rico, before the undersigned.

All parties were represented at the hearing, were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues involved, and were afforded opportunity to present oral argument. At the close of the hearing, November 16, 1984, was fixed as the date for mailing post-hearing briefs, which time was subsequently extended, upon timely motion of the Respondents, to which General Counsel did not object, for good cause shown, to December 14, 1984. Each Respondent and General Counsel timely filed and mailed a brief, received on, or before, December 17, 1984, which have been carefully considered. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

Findings and Discussion

1. The Department of Defense's (DOD) Armed Services Exchange Regulation (ASER), DOD Directive 1330.9, October 29, 1971, had been applicable only to the Continental United States (CONUS). Mr. Clare A. Moelk, Assistant Director for Military Personnel Administration and Services, Office of the Secretary of Defense, testified that in January, 1978, he received a call from the Senior Staff member for the Nonappropriated Fund Panel (NAF Panel), now the Moral, Welfare and Recreation Panel (MWR Panel), ". . . that Congress wished the Exchange Regulation revised. One of the revisions that they wanted was to make it worldwide rather than just applicable to CONUS" (Tr. 74 (A)). A working

level committee was set up and the revised Regulation was completed and transmitted to House Committee on Armed Services (HCAS) on May 8, 1979 (Tr. 75, Res. Exh. 3, p. 47). The proposed Regulations are set forth at pp. 48-85 of Respondent Exhibit 3. Section II provided, in part, as follows:

> "AUTHORIZED PATRONS
>
> "2-000 Scope of Section. This section lists the individuals and organizations entitled to unlimited and limited exchange privileges, except as may be modified in foreign countries by treaty or other international agreements; specifies the limited privileges which are to be extended to classes of personnel not entitled to unlimited privileges; and sets forth the identification of authorized patrons.
>
> "Part 1 - Unlimited Privileges
>
> "2-101 Patrons Entitled to Unlimited Privileges. The following individuals and organizations are entitled to all exchange privileges:
>
> . . .
>
> "p. U.S. civilian employees of the Department of Defense and their dependents stationed outside the CONUS, Alaska, and Hawaii.
>
> . . .
>
> "Part 2 - Limited Privileges
>
> "2-201 Patrons Entitled to Limited Privileges. The following classes of persons shall be entitled to limited exchange privileges as set forth below and as restricted to Section IV, Part 7 of this Directive.[2/]
>
> . . .
>
> 2-201.6 Civilian Employees Within the CONUS, Alaska, and Hawaii not Residing on Military Reservations. Civilian employees working on but residing off Military reservations shall be entitled to the privileges of the fountain, snack bar, and

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2/ Part 7 deals with taxes, e.g. civilian employees could not purchase state tax free tobacco products (4-702) or beverages (4-703).

> restaurant when the local commanding officer determines that these facilities are not conveniently available from other sources.
>
> . . ." (Res. Exh. 3, pp. 57-58)

2. Hearings were held by the Panel on Nonappropriated Fund Activities of the Investigations Subcommittee of the Committee on Armed Services, House of Representatives on May 31, 1979. The Assistant Secretary of Defense for Military Personnel Policy, Major General Stanley M. Umstead, Jr., testified, in part as follows:

> "The first substantive change we have made in the proposed revision is to extend the scope of the ASER to apply worldwide so as to provide more commonality with the Armed Services Commissary Store Regulations.[3] In so doing we have incorporated current overseas patron eligibility policies regarding Department of Defense civilian employees and contractor employees and have noted that patron eligibility in foreign countries is governed by treaty or other international agreements." (Res. Exh. 3, p. 2)

The NAF Panel inquired, so far as I have noted, only as to two specific patron coverage questions:[4] (1) exchange and commissary employees (exchange employees may purchase [2-201.4 Exchange Employees. Exchange employees shall be entitled to all privileges of the exchange system by which they are employed, except for purchase of articles of uniform and state tax free items. Dependents of this patronage category are authorized access to exchanges, but are not authorized to make purchases] but commissary employees cannot (Res. Exh. 3, p. 7); and 2) foreign military attaches (Res. Exh. 3, pp. 6-8).

Nothing in the Hearing (HASC No. 96-12; Res. Exh. 3) shows any discussion, justification for, or concern by the NAF Panel, of the withdrawal of unlimited Exchange privileges for civilian employees in either Hawaii or Alaska. As Alaska and Hawaii had become states in 1959, notwithstanding that they were outside the definition of CONUS, their status as states may well have been a controlling reason for extending DOD's policy to Alaska and Hawaii as later surmised by Colonel Robert C. Deshler (Res. Exh. 1); but, other than setting forth what it proposed to do in its Regulation, the record simply does not show any reason for its

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3/ DOD Directive 1330.17, published May 4, 1978 (Res. Exh. 3, p. 47).

4/ Actually, in a sense, a third: military divorcees (Res. Exh. 3, p. 8).

actions in this regard beyond, perhaps, maximum, "commonality . . with DOD Directive 1330.17 'Armed Services Commissary Store Regulations'. . . ." (Res. Exh. 3, p. 47) Whether like action had been taken in the Commissary Regulations and whether justification had been given with respect to the Commissary Regulations (published May 4, 1978) was not shown.

Nevertheless, there were hearings on the proposed Regulations for Exchanges in 1979 and by letter dated June 28, 1979, the Honorable Melvin Price, Chairman of HASC, advised Captain Richard J. Fleeson, Acting Deputy Assistant Secretary of Defense, as follows:

> "On May 8, 1979, the Department of Defense requested House Armed Services Committee approval of proposed revisions in the Department of Defense Armed Services Exchange Regulations. The Committee has no objection with the exception of the request to authorize sale of television sets and microwave ovens in military exchanges.
>
> "The Committee does not feel the sale of these items should be authorized at this time." (Res. Exh. 5).

3. Mr. Moelk testified that when Mr. Daniel's subcommittee (NAF Panel, now MWR Panel) makes recommendations to the Department of Defense with respect to patronage, use of the Exchanges, DOD considers such recommendations a fait accompli (Tr. 79), that,

> "The Congress at various times have recommended that 100% disabled vterans (sic) or persons of that nature be added to the Exchange patron eligability (sic) and to my knowledge we have always acceded to their desires in that regard." (Tr. 79).

4. The proposed Regulation was issued as DOD Directive 1330.9, July 8, 1980 (G.C. Exh. 15).

5. On May 12, 1982, DOD Directive 1330.9 was amended, as pertinent hereto, to add "Puerto Rico" to Section 2-101 p. and to Sec. 2-201.6. As amended, these sections now read as follows:[5]

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[5] Mr. Moelk testified that: "In 1980 then, by Change 3 to the Regulation, we equated Puerto Rico to the Continental United States, Alaska and Hawaii and said in effect that DOD Civilians in this area did not have exchange privileges except for the Snack Bar." (Tr. 91; see, also, Tr. 92;" With regard to Puerto Rico, that was added on October 27,

(Footnote Continued)

Part 1 - Unlimited Privileges

> "2-101 Patrons Entitled to Unlimited Privileges. The following individuals and organizations are entitled to all exchange privileges:
>
> . . .
>
> "p. U.S. civilian employees of the Department of Defense and their dependents stationed outside the CONUS, Alaska, Hawaii, and Puerto Rico.
>
> . . ." (G.C. Exh. 14)

Part 2 - Limited Privileges

> "2-201 Patrons Entitled to Limited Privileges. The following classes of persons shall be entitled to limited exchange privileges as set forth below and as restricted by section IV, part 5, of this enclosure.
>
> . . .

5/ (Footnote continued)

1980 when we changed the Regulation and in effect added Puerto Rico" (Tr. 94)). See G.C. Exh. 17 to like effect. Mr. Moelk appears to be correct; but the record also shows that the change was made as to Puerto Rico on May 12, 1982. Note, the references on G.C. Exh. 14 refer only to 1330.9 July 8, 1980; Colonel Deshler's letter dated October 26, 1983 (Res. Exh. 1) refers only to 1330.9 dated 12 May 1982; and Mr. W. J. Schrader's response to Request for Labor Relations Guidance (Res. Exh. 2) specifically states:

> "Thus, from May 1982, Fort Buchanan has lacked the authority to grant exchange privileges to the civilians" (Res. Exh. 2, p. 3).

Moreover, Mr. Johnson testified that he had never heard of Change No. 3 to DOD 1330.9 until Mr. Moelk testified at the hearing. Nor, as indicated above, does it appear that Change No. 3, if implemented, was effectively disseminated.

Consequently, on the basis of the record, I assume for all purposes herein that the amendment of DOD Directive 1330.9 with respect to Puerto Rico was effective May 12, 1982.

> 2-201.6 Civilian Employees Within the CONSUS, Alaska, Hawaii, and Puerto Rico Not Residing on Military Reservations. Civilian employees working on but residing off military reservations shall be entitled to the privileges of the fountain, snack bar, and restaurant when the local commanding officer determines that these facilities are not conveniently available from other sources.
>
> . . ." (G.C. Exh. 14).

6. There were no hearings on modification adding Puerto Rico to § 2-101 p or to § 2-201.6 (Tr. 94); nor does the record show that Congress in general or the NAF, or MWR, Panel or the HASC in particular made any recommendation or request to DOD with regard thereto. The record shows no reason or justification for the 1982 amendment. Indeed, the record does not even show that the NAF, or MWR, Panel, or HASC, was even informed of the 1982 amendment, although, based on Mr. Moelk's testimony that he consisently maintains a close relationship with the Committee, and that there is an understanding with Congress that every change will be submitted (Tr. 77), I assume that the Committee was informed of the 1982 amendment of DOD Directive 1330.9. I further assume that if the Committee were informed it did nothing.

7. For at least eighteen years, civilian employees at Fort Buchanan had enjoyed Exchange privileges (Tr. 23). The exchange included a shoppette where employees could buy certain grocery items including milk and poultry imported from the United States. Milk and poultry imported from the United States is generally preferred over the same products originating in Puerto Rico because certain chemicals in both Puerto Rican milk and poultry assertedly have a detrimental effect on the maturation process of children (Tr. 28, 36).

8. In June 1983, Mr. Jose Quinones, President of Local 2614, began receiving complaints from bargaining unit employees regarding the failure of Fort Buchanan to renew their exchange passes (G.C. Exh. 2). Mr. Quinones contacted Mr. Spencer Johnson, Civilian Personnel Liaison Officer at Fort Buchanan, by letter dated June 22, 1983. Mr. Johnson instructed the officer in charge of issuing ID cards to renew the ID's because proper notification had not been given to the Union and informed Mr. Quinones that the passes would be renewed (Tr. 39, 100).

9. Upon learning of the May 12, 1982 amendment of DOD Directive, the date not having been shown, a Request for Labor Relations Guidance had been submitted [6/] to which Mr. W. J. Schrader, Chief, Office of Labor

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[6/] Fort Buchanan's non-compliance with DOD Directive 1330.9 (May 12, 1982) has been noted in an Inspector General's Report (Tr. 131, 132) and it seems probable that, while the "Request" (Res. Exh. 2) appears in form to have originated from Fort Buchanan, the "Request" was actually in response to the Report of the Inspector General (see, Tr. 99, 100).

and Employee Relations, Department of the Army, responded by letter dated May 26, 1983 (Res. Exh. 2). In his response, Mr. Schrader instructed Fort Buchanan, since it was without authority to grant Exchange privileges to civilian employees to ". . . take timely steps to bring itself into compliance with the DOD Directive." (Res. Exh. 2).

10.. On October 26, 1983, Fort Buchanan (Colonel Deshler) submitted a "Request for Technical Correction of DOD Directive 1330.9" (Res. Exh. 1) which sought, ". . . deletion of the term 'and Puerto Rico' from paragraph 2-101, i, p, q, r, and paragraphs 2-201.5 thru 2-201.7." (Res. Exh. 1). Colonel Deshler obtained approval, pending response to his Request for Technical Correction, to continue exchange privileges until January 31, 1984.

11. On November 4, 1983, Mr. Johnson gave Mr. Quinones Colonel Deshler's letter (to Mr. Quinones) which stated, in part, that:

> "The Department of Defense (DOD) Regulation for Exchange Privileges (PX) has been revised. This regulation now prohibits local Commanders from extending exchange privileges to civilian employees in the Continental United States, Hawaii, Alaska and Puerto Rico. On 25 May 1983, the Department of the Army (DA) provided directions regarding compliance with this regulation . . .
>
> "This headquarters has recently asked the Department of the Army for relief from this regulation in Puerto Rico. In addition, I have obtained approval to continue PX privileges until 31 January 1984 to reduce the impact of this change during the Christmas season.
>
> "It is recognized that the new DOD regulation will adversely affect our civilian workforce . . . In the event that our request for relief is not favorably considered, the termination of exchange privileges on 31 January 1984 will not affect the use of Post snack facilities . . .
>
> "Please provide us with any comments you may have by 25 November 1983." (G.C. Exh. 3).

Later, on November 4, 1983, a Memorandum to All Employees was issued and distributed (G.C. Exh. 4).

12. On December 19, 1983, the Union requested negotiations ". . . over the proposed revocation of PX privileges and/or the impact and implementation of this proposed revocation." (G.C. Exh. 5); Mr. Johnson replied by letter dated December 27, 1983 (G.C. Exh. 6); and the parties

met on January 12, 1984. At the meeting on January 12, Fort Buchanan informed the Union that the decision to terminate Exchange privileges was non-negotiable (Tr. 115). Indeed Mr. Quinones stated that Fort Buchanan declared the Union's proposal, ". . . U.S. Army Fort Buchanan, Puerto Rico will immediately grant all civilian personnel same Post Exchange privileges as Military Personnel . . . ." (G.C. Exh. 7), non-negotiable. He testified that,

> "Since the beginning they told me that it is not a negotiable proposal. Since the beginning." (Tr. 44).

Although Fort Buchanan advised the Union on January 12, 1984, that the decision to terminate Exchange privileges was non-negotiable (see, Res. Exh. 2, where Mr. Schrader had categorically informed Fort Buchanan that "The decision to withdraw privileges is nonnegotiable."), Fort Buchanan at that time informed the Union that,

> ". . . there is a difference between our authority to negotiate on substantive areas of the Regulation and . . . the authority we had to conduct I & I bargaining.
>
> . . .
>
> ". . . obviously we had to, if the Union did not desire to raise and to have us consider I & I bargaining, of course that was their choice.
>
> "But we wanted to make that clear and give them every opportunity to do that." (Tr. 115).

13. By letter dated January 16, 1984 (G.C. Exh. 8), the Union, inter alia, requested that,

> "4. Until all efforts to exclude Puerto Rico from DOD directive have been made and finalized, union request that PX cards not be taken away and the use of post convenience store be authorize(d)" (G.C. Exh. 8).

Mr. Johnson replied by letter dated January 19, 1984, in which he stated, in part, as follows:

> "Telephonically, I was notified . . . that the Post Commander's request for removal of Puerto Rico . . . has been disapproved. [Confirmed January 25, 1984. Res. Exh. 1] . . . Accordingly, the Post Commander has no legal authority to grant any additional delay in implementation of the Department of Defense Directive." (Res. Exh. 9).

Mr. Johnson in his letter of January 19, again asked Mr. Quinones to, ". . . address the adverse affect (sic) on working conditions which can be alleviated by some other manner of implementation of the DOD Directive. Management remains available for any additional meetings that you may desire on this matter." (G.C. Exh. 9).

14. By letter dated January 30, 1984, (G.C. Exh. 11), the Union again asked that,

> ". . . until all efforts to exclude Puerto Rico from DOD Directive have been made and finalized, PX cards not be taken away . . . and the use of Post food land store be authorized." (G.C. Exh. 11).

15. On January 31, Exchange privileges for bargaining unit employees [about 300 or 400 Tr. 49] were terminated effective close of business January 31, 1984, except that,

> "3. Civilian employees will be allowed to complete PX purchase transactions (i.e. Rain Checks or lay-a-ways) which were initiated prior to withdrawal of privileges. . . ." (G.C. Exh. 12).

16. By letter dated January 31, 1984, addressed to Colonel Deshler (received February 1, 1984 (Tr. 113)), Mr. Quinones acknowledged that,

> ". . . We realize that you are and have been trying to help us in the matter of the PX privileges for some time. As you say in your last letter dated 19 January 1984, your hand (sic) are tied because this directive has come from DOD, and you have no further say in the matter . . . ." (G.C. Exh. 13).

In his letter of January 31, Mr. Quinones requested,

> ". . . that we can continue to shop at the Food land Store . . . ." (G.C. Exh. 13).

17. The Department of the Army has not, since the issuance of DOD Directive 1330.9 on July 8, 1980, which governs Exchange operations of the Army, Navy, Air Force, and Marine Corps world-wide, issued separate implementing regulations.

18. Civilian employees in Puerto Rico, both before and after January 31, 1984, receive a cost of living allowance (Tr. 111, 112, 115).

Conclusions

There is no dispute that Respondent Fort Buchanan refused to bargain with respect to the decision to terminate Exchange privileges for civilian employees and refused to bargain on the Union's proposal that civilian employees be granted the same Exchange privileges as military personnel.[7] Nor is there any question that Respondent Department of the Army directed Respondent Fort Buchanan to bring itself into compliance with DOD Directive 1330.9 (May 12, 1982); that Respondent Department of the Army declared the decision to withdraw Exchange privileges non-negotiable; or that Respondent Fort Buchanan refused to negotiate on the withdrawal of Exchange privileges because of orders of higher authority. The Authority has repeatedly held that a separate violation of the duty to bargain can not be held against a subordinate activity based solely upon the subordinate activity's ministerial action in implementing the directives from higher level management. Department of the Interior, Water and Power Resources Service, Grand Coulee Project, Grand Coulee, Washington, 9 FLRA No. 46, 9 FLRA 385 (1982); Department of Health & Human Services, Social Security Administration, Region VI, and Department of Health and Human Services, Social Security Administration, Galveston, Texas, District, 10 FLRA No. 9, 10 FLRA 26 (1982); Defense Logistics Agency, et al., 12 FLRA No. 86, 12 FLRA 412 (1983); National Treasury Employees Union and National Treasury Employees Union, Chapter 121, 16 FLRA No. 102, 16 FLRA 717 (1984). Accordingly, the Complaint against Respondent Fort Buchanan is hereby dismissed.

The privilege of purchasing at the Exchange flowed from employment and was a significant and valued benefit of their employment. The privilege of buying a wide range of items, including clothing, shoes, small appliances, furniture, toys, milk, eggs, poultry, magazines, etc. (Tr. 23-29), of high quality at reduced prices, while not a direct form of compensation, is certainly an adjunct to compensation and directly affects the work situation and employment relationship of bargaining unit employees. Indeed, DOD conceded that Exchange privileges had been contractually offered as an inducement for employment in Puerto Rico (G.C. Exh. 17). I conclude, therefore, that Exchange privileges constitute a condition of employment within the meaning of §§ 2(2) and 3(a)(14) of the Statute. National Treasury Employees Union, 3 FLRA No. 112, 3 FLRA 692 (1980); (outside employment); American Federation of Government Employees, AFL-CIO, 2 FLRA No. 77, 2 FLRA 604, 606 (1980) (daycare centers), enf'd as to other matters sub non. Department of Defense v. Federal Labor Relations Authority, 659 F.2d 1140 (D.C. Cir. 1981), cert. denied sub nom. AFGE v. FLRA, 455 U.S. 945 (1982); National Federation of Federal Employees, Local 1363, 4 FLRA No. 23, 4 FLRA 139 (1980) (ration control), enf'd sub nom, Department of Defense, Department of the Army, and Headquarters, Eighth U.S. Army Garrison, Yongsan, Korea, v. Federal

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[7] It is clear, however, that Fort Buchanan recognized its obligation to bargain on the impact and implementation of the termination of Exchange privileges; informed the Union; and solicited proposals from the Union. Whether the Union exercised its right to bargain on impact and implementation, Respondent Fort Buchanan did not refuse to bargain in good faith as to the impact and implementation of the termination of Exchange privileges.

Labor Relations Authority, 685, F.2d 641 (D.C. Cir. 1982); Harry Diamond Laboratories, and Department of the Army and Department of Defense, 15 FLRA No. 43, 15 FLRA 216 (1984) (paid parking); Boston District Recruiting Command, Boston, Massachusetts, et al., 15 FLRA No. 142, 15 FLRA 720 (1984) (paid parking); Boston Contract Administration Services Region, Boston, Massachusetts, et al., 15 FLRA No. 143, 15 FLRA 750 (1984) (paid parking); Department of the Air Force, Eielson Air Force Base, Alaska and American Federation of Government Employees, Local 1836, AFL-CIO, Case No. 9-CA-30009 (OALJ-84-49, March 19, 1984) (exchange privileges for civilian employees). Moreover, bargaining unit employees had been granted exchange privileges since 1966 and such privileges, long enjoyed, had become an established condition of their employment. United States Department of Justice, United States Immigration and Naturalization Service, 9 FLRA No. 36, 9 FLRA 253 (1982); Social Security Administration, Mid-America Service Center, Kansas City, Missouri, 9 FLRA No. 33, 9 FLRA 229 (1982); Department of the Navy, Naval Underwater Systems Center, Newport Naval Base, 3 FLRA No. 64, 3 FLRA 413 (1980).

Because it was a condition of employment, exchange privileges could not be terminated without bargaining with the Union, unless such bargaining was foreclosed by DOD regulations for which there was a compelling need. As noted above, while Fort Buchanan, with whom the Union holds exclusive bargaining rights, refused to bargain concerning the termination of Exchange privileges, it did so pursuant to direction of higher authority, the Department of the Army, which in turn acted pursuant to controlling direction of higher authority, the Department of Defense. Both Respondent Department of the Army and Respondent Department of Defense rely on § 17(a)(2) of the Statute. To preserve their legal position, it was asserted at the hearing (Tr. 64-67; 126-127) and is asserted in their brief (Post-Hearing Brief of Respondents Department of Defense and Department of the Army, pp. 3, 5-6), that the duty to bargain under § 17 extends to matters which are the subject of agency regulation (here DOD Directive 1330.9, May 12, 1982) only if the Authority has previously determined pursuant to § 17(b) that no compelling need exists for the regulation and further that compelling need may not be determined in an unfair labor practice proceeding, inter alia, because § 17(b)(3) provides that if a hearing is held it ". . . shall not include the General Counsel as a party." Counsel for Respondents Department of Defense and Department of the Army recognizes that the Authority has held to the contrary, where the regulation changes an established condition of employment. Defense Logistics Agency (Cameron Station, Virginia) et al., 12 FLRA No. 86, 12 FLRA 412 (1983);[8] U.S. Army Engineer Center and Fort

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[8] The decision of the Authority, i.e., assertion of jurisdiction to determine compelling need in an unfair labor practice proceeding, was affirmed by the United States Court of Appeals for the District of Columbia in Defense Logistics Agency, et al., v. Federal Labor Relations Authority, No. 83-2017 (February 15, 1985).

Belvoir and U.S. Department of the Army, 13 FLRA No. 116, 13 FLRA 707 (1984),[9] and that the decisions of the Authority are binding on the undersigned. Accordingly Respondents Department of Defense and Departmen of the Army undertook to prove that a compelling need exists for DOD Directive 1330.9, May 12, 1982.[10]

Although the record is devoid of any testimony or evidence as to specific compelling need for the withdrawal of authority to grant unlimited exchange privileges to civilian employees in Puerto Rico, indee the record shows no reason or justification for the action, the record as developed by Respondents Department of Defense and Department of the Army advances three bases for compelling need: First, the fact that DOD Directive 1330.9 applies to all military Exchanges of all Military Departments, i.e, to the Department fo the Army, Navy (including the Marine Corps), and Air Force. One of the illustrative criteria for compelling need set forth in the Authority's Rules and Regulations is:

> "(a) The rule or regulation is essential, as distinguished from helpful or desirable, to the accomplishment of the mission or the execution of functions of the agency or primary national subdivision in a manner which is consistent with the requirements of an effective and efficient government." (5 C.F.R. § 2424.11(a)).

Issuance by DOD of a regulation applicable to all military Departments wa essential to achieve the uniformity of Exchange regulations under a singl regulation as desired by Congress ". . . in a manner . . . consistent wit the requirements of an effective and efficient government." This might well constitute compelling need for DOD's July 8, 1980, Directive (G.C. Exh. 15); but this case concerns DOD's action of May 12, 1982, not the Directive issued July 8, 1980. There is language in the parking cases (Harry Diamond Laboratories, supra; Boston District Recruiting Command, supra; and Boston Contract Administration Services, supra) which might infer that the mere issuance of a DOD Directive, or Regulation, applicabl to all Military Departments, alone, constitutes compelling need; but I do not believe this view was intended by the Authority. To the contrary, th Authority has stated that,

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[9] This case has been appealed to the Court of Appeals for the Fourt Circuit, Docket No. 84-1327 (filed March 30, 1984) and oral argument was held in 1985; but no decision has been issued.

[10] The issue of compelling need for the same Regulation as it applies to Puerto Rico is pending before the Authority in a negotiability proceeding: Antilles Consolidated School Systems, Roosevelt Roads, Puert Rico and Antilles Consolidated Education Association, 0-NG-784 (Res. Ex 2).

> ". . . where an agency raises compelling need as an affirmative defense in an unfair labor practice proceeding, it is required to come forward with affirmative support for that assertion. In the instant case, the record is devoid of support for the mere assertion that a compelling need exists for those portions of AR 690-400 to bar negotiations on the Union's conflicting proposals." (U.S. Army Engineer Center and Fort Belvoir and U.S. Department of the Army, supra, 13 FLRA at 711) (see, also, Defense Logistics Agency (Cameron Station, Virginia), et al., 12 FLRA at 416).

Although the Authority in U.S. Army Engineer Center considered a Regulation of the Department of Army and in Defense Logistics Agency considered a regulation of the Defense Logistics Agency, I conclude that the mere issuance of a Regulation, even by the Department of Defense applicable to all Military Departments, does not, standing alone, constitute compelling need and that the agency must come forward with affirmative support for that assertion. This is particularly true where, as here, a change included in a regulation applicable to the Exchange operations of all military Departments worldwide, affected only Puerto Rico.

Second, that through Congressional oversight, in particular by HASC, a mechanism exists for the control of the operation of military exchanges. This is certainly correct. Another of the illustrative criteria for compelling need set forth in the Authority's Rules and Regulations is:

> "(c) The rule or regulation implements a mandate to the agency or primary national subdivision under law or other outside authority, which implemention is essentially non discretionary in nature." (5 C.F.R. § 2424.11(c)).

In National Federation of Federal Employees, Local 1669, 13 FLRA No. 37, 13 FLRA 176 (1983), where it was asserted that a compelling need existed, as they implemented a legal mandate, for National Guard Bureau (NGB) regulation, Technician Personnel Regulation (TPR) 900 (935.1) and Air National Guard Regulation (ANGR) 90-1, the Authority stated as follows:

> "In its report accompanying the 'Department of Defense Appropriation Bill, 1982,' the House Committee on Appropriation included a directive to the Department of Defense to the effect that National Guard technicians in travel status would occupy government quarters based on their military grade (footnote omitted), which directive was agreed upon by the Committee of Conference. (footnote omitted). By these actions, the Agency was placed under a mandate

> from Congress requiring that technicians be assigned government quarters based on military grade as contrasted to civilian grade when in travel status. The provisions of TPR 900 (935.1) reflec" this non discretionary mandate. Thus, TPR 900 (935.1) meets the criterion for determining compelling need . . . ." (13 FLRA at 177-178).

The Authority decision was affirmed, 745 F.2d 705 (D.C. Cir. 1984).

The Authority has not defined the boundaries of "outside authority" nor has it further defined the boundaries of "mandate from Congress." Indeed in affirming the decision of the Authority, the Court stated, in part:

> ". . . if FLRA had found otherwise it would have required the Guard to risk defying the instruction in the conference report through collective bargaining. We cannot say that it was arbitrary and capricious to find such a provision within the 'compelling need' exception that Congress specifically charged FLRA with charting. (745 F.2d at 708).
>
> . . .
>
> "We therefore limit our affirmance to the facts of this case . . . without further explication by FLRA of its 'outside authority' standard, however, we would be most reluctant to approve similar conclusory declarations of 'outside authority.'" (745 F.2d at 709).

Whether outside authority would include a Committee, such as HASC, and/or whether mandate of Congress would include matters not made the subject of legislation, at best is undetermined. If it did, then a strong argument could be made that DOD's 1980's Directive was pursuant to a mandate with which implementation was essentially nondiscretionary. There, HASC had requested that DOD issue a regulation to govern Exchanges worldwide; DOD submitted the proposed regulation to HASC; hearings were held; and thereafter HASC stated that it had no objection, with the exception of the request to authorize sale of television sets and microwave ovens in military exchanges.

Mr. Moelk testifed, it is true, that DOD considered recommendations of the NAF Panel (now MWR Panel) a fait accompli. Assuming, but not deciding, that a recommendation of the NAF, or MWR, Panel constituted a mandate of Congress, an assumption supported by its exercise of oversight of Exchange operations for many years, nevertheless, action by DOD in the absence of any recommendation certainly can not be considered as action taken pursuant to a mandate of Congress. Here, the record is wholly devoid of any evidence that the NAF, or MWR, Panel or the HASC had any interest or concern whatever about the utilization of Exchange privileges by civilian employees in Puerto Rico. To the contrary, DOD's proposed Directive on which hearings were held in 1979 authorized exchange privileges for civilian employees everywhere except in the Continental United States, Alaska, and Hawaii. Accordingly with full notice of the coverage of DOD Directive 1330.9 as proposed, and as issued on July 8, 1980, neither the NAF Panel nor the HASC expressed any concern, made any request or recommendation that such privileges be withdrawn for civilian employees in Puerto Rico, but, rather, approved the Directive without reservation as proposed, except for the request to sell television sets or microwave ovens in military exchanges. Although Judge Oliver reached a contrary conclusion in Department of the Air Force, Eielson Air Force Base, Alaska, supra, a compelling argument certainly can be made that the July 8, 1980, DOD Directive was issued pursuant to a mandate of Congress. Nevertheless, the only "mandate of Congress," if there were one, pertained to the July 8, 1980, regulation, which HASC had requested, had held hearings on the proposed regulation in 1979, had signified its approval on June 28, 1979, and the regulation duly issued on July 8, 1980. The fact that there is a mechanism for Congressional control of military exchanges does not, in my opinion, mean that there is a "mandate of Congress" for a particular change, here specifically the May 12, 1982[11] change of DOD Directive 1330.9 which withdrew authority to grant unlimited Exchange privileges to civilian employees in Puerto Rico, when there is no request by Congress for such change and no action by Congress, i.e., no hearings, no statement of approval with, or without, hearings. In such instances, to establish compelling need more must be shown than that there is a mechanism through which Congress might have acted, but, as to the May 12, 1982, change, did not.

Third, that HASC, by silence, approved the May 12, 1982, change. This, of course, is essentially an extension of the Second ground. Nothing in the record shows, or even suggests, that Congress had any interest whatever in the restriction of Exchange privileges for civilian employees in Puerto Rico. As previously noted, Congressional intent was wholly to the contrary. Thus, by approving the proposed regulation on June 28, 1979, which clearly did not withdraw authority to grant unlimited exchange privileges for civilian employees in Puerto Rico, it necessary follows that HASC approved the grant of unlimited exchange privileges for civilian employees outside the Continental United States, Alaska and Hawaii. Nothing in the record shows that HASC thereafter sought any change as to Puerto Rico, no hearings were held, and if HASC was given notice of the change, and I assume for reasons previously stated that it was given notice, although the record does not specifically show any notice to HASC of this change, the most than can be said is that HASC did nothing after notice of the proposed change as to Puerto Rico. In my opinion, this falls far short of constituting compelling need because, obviously, DOD did not act pursuant to a "mandate of Congress."

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[11] As previously noted, if Change No. 3, which purported to have withdrawn authority to grant unlimited Exchange privileges to civilian employees in Puerto Rico on October 27, 1980, were implemented, the implementation of Change No. 3 was flawed by the lack of its dissemination.

DOD Directive 1330.9, May 12, 1982 (G.C. Exh. 14) by setting forth in Section 2-101 Patrons Entitled to Unlimited privileges and by limiting such privileges to civilian employees,

> ". . . outside the CONUS, Alaska, Hawaii, and Puerto Rico" (G.C. Exh. 14, Section 2-101 p.)

clearly terminated the authority to grant unlimited exchange privileges to civilian employees in the Continental United States (CONUS), in Alaska, in Hawaii, and in Puerto Rico. To this extent, I respectfully disagree with Judge Oliver's statement, in Department of the Air Force, Eielson Air Force Base, Alaska and American Federation of Government Employees, Local 1836, AFL-CIO, supra, that,

> "With respect to Respondent's reliance upon DOD directive 1330.9 . . . [the July 8, 1980 Directive, here G.C. Exh. 15, which in Section 2-101 p. authorized unlimited Exchange privileges for civilian employees, ". . . outside the CONUS, Alaska, and Hawaii."] nothing in that regulation prohibits negotiations with the Union regarding the extension of Base Exchange privileges nor requires that the privileges be withdrawn . . . ." (OALJ-84-49 at p. 13) (Emphasis supplied).

DOD Directive 1330.9, first as to the Continental United States prior to 1980, then as to CONSUS, Alaska and Hawaii in 1980, and as to CONUS, Alaska, Hawaii and Puerto Rico in 1982, did prohibit negotiations with respect to the extension of Exchange privileges to civilian employees in the CONUS, Alaska, Hawaii and Puerto Rico and did require that Exchange privileges previously granted in the CONUS, Alaska, Hawaii and Puerto Rico be withdrawn for the reason that authorization to grant unlimited Exchange privileges to civilian employees in the CONUS, Alaska, Hawaii and Puerto Rico was withdrawn. The only exception to deviations involving patron privileges is that contained in Section 1-102 to the Secretaries of the Military Departments which provides as follows:

> "b. Secretaries of the Military Departments may grant deviations involving patron privileges. Delegation of this authority is prohibited. Deviations involving patron privileges shall be based on alleviating individual hardships." (G.C. Exhs. 14 and 15, Section 1-102 b) (Emphasis supplied).

DOD Directive 1330.9, May 12, 1982, did withdraw authority to grant unlimited Exchange privileges to civilian employees in Puerto Rico. Department of the Army implemented DOD Directive 1330.9; declared the decision to withdraw the authority to grant unlimited Exchange privileges in Puerto Rico was non-negotiable; and directed Fort Buchanan to bring itself into compliance by January 31, 1984. If there were compelling need for the May 12, 1982, amendment of DOD Directive 1330.9 withdrawing the authority to grant unlimited Exchange privileges in Puerto Rico, there was no violation of the Statute by either the Department of Defense or the Department of the Army; but, as the record shows no basis for a finding of compelling need for the May 12, 1982, amendment, DOD Directive 1330.9, May 12, 1982, may not bar negotiations with the Union concerning the decision to terminate Exchange privileges for civilian employees in Puerto Rico. As the Department of the Army, a subordinate activity of the Department of Defense, implemented the directive of higher level management, I am constrained to conclude that, as was true as to Fort Buchanan, a separate violation of the duty to bargain can not be held as to the Department of the Army.[12] Accordingly, the Complaint against the Department of the Army is hereby dismissed.

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[12] In *Department of Health and Human Services, Social Security Administration, Region VI, and Department of Health and Human Services, Social Security Administration, Galveston, Texas District*, *supra*, I had stated that this policy achieves no discernable purpose, 10 FLRA at 42, n. 7. *See*, also *National Treasury Employees Union and National Treasury Employees Union, Chapter 121*, *supra*, 16 FLRA at 730-731, as to labor organizations, (rejected by the Authority, 6 FLRA at 718). I agree with the statement of the late Judge Kramer in *The Adjutant General, State of Illinois, Illinois Air National Guard*, A/SLMR No. 598, 5 A/SLMR 759, 770, n. 22,

> "I am reluctant to recommend that the Adjutant General be ordered to do anything. His office bargained in obvious good faith and he did nothing wrong except upon direct orders from his superior. But his innocence and good faith does not change the fact that the technicians here involved were wronged as a result of his following orders . . . and full relief requires his participation in the remedy since he is the other party to the agreement."

The Assistant Secretary agreed.

Here, Fort Buchanan refused to negotiate, albeit at the direction of the Department of the Army. The Department of the Army declared the decision non-negotiable and directed Fort Buchanan to bring itself into compliance with the DOD Directive, also pursuant to controlling regulations of higher level of management, the Department of Defense. The

(Footnote continued)

The Department of Defense by its amendment of DOD Directive 1330.9 on May 12, 1982 (and/or by its Change No. 3 on October 27, 1980, notice of which was not communicated to either Fort Buchanan or the Department of the Army), violated § 16(a)(1) of the Statute and it, by withdrawing authority to grant Exchange privileges to civilian employees in Puerto Rico, for which no compelling need was shown, interfered with, restrained, or coerced employees in the exercise by the employees of their right to engage in collective bargaining with respect to conditions of employment through representatives duly chosen by them under the Statute.

Having found that the Department of Defense violated § 16(a)(1) of the Statute, it is recommended that the Authority adopt the following:

ORDER

Pursuant to § 18(a)(7) of the Statute, 5 U.S.C. § 7118(a)(7), and § 2423.29 of the Regulations, 5 C.F.R. § 2423.29, the Authority hereby orders that the Department of Defense shall:

1. Cease and desist from:

   (a) Unilaterally withdrawing authority to grant unlimited Exchange privileges to civilian employees in Puerto Rico.

   (b) In any like to related manner interfering with, restraining, or coercing its employees in the exercise of their rights under the Statute.

12/ (Footnote continued)

bargaining relationship exists only between the Union and Fort Buchanan and a full and complete remedy could be afforded only by an order to bargain. At least where all levels of management are parties, I again suggest that an appropriate order should run to each party. Not only would a more complete remedy be possible, but the purpose and policy of the Statute would be more properly vindicated. To refrain from finding a violation by subordinate levels of management because they obeyed the direction of a higher level of management achieves no discernable purpose except to excuse actual violations on the basis that subordinates acted in good faith by obeying the orders of their superiors. The fact remains that both Fort Buchanan and the Department of the Army violated the Statute, yet neither is ordered to do anything to remedy their violations.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Withdraw that portion of the May 12, 1982, DOD Directive 1330.9, Section 2-101 p. which added the words "and Puerto Rico" and forthwith reinstate the provisions of DOD Directive 1330.9, Section 2-101 p. as issued on July 8, 1980.

(b) Notify the Department of the Army, Fort Buchanan and American Federation of Government Employees, Local 2614, forthwith that it has withdrawn Section 2-101 p. of DOD Directive 1330.9 issued on May 12, 1982, and that it has reinstated the provisions of DOD Directive 1330.9, Section 2-101 p. as issued on July 8, 1980.

(c) Post at the facilities of Fort Buchanan copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Secretary of Defense, or his designee, and shall be posted and maintained for a period of 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that said Notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director of Region IV, Federal Labor Relations Authority, Suite 501, North Wing, 1776 Peachtree Street, NW., Atlanta, Georgia 30309, in writing within 30 days from the date of this Order as to what steps have been taken to comply herewith.

William B. Devaney

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: March 15, 1985
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally withdraw authority to grant unlimited Exchange privileges to civilian employees in Puerto Rico.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the excerise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL forthwith withdraw the provisions of DOD Directive 1330.9, Section 2-101 p., May 12, 1982, and will forthwith reinstate the provisions of DOD Directive 1330.9, Section 2-101 p. as issued on July 8, 1980.

DEPARTMENT OF DEFENSE

Dated: ______________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region IV, whose address is: Suite 501, North Wing, 1776 Peachtree Street, NW., Atlanta, Georgia 02116, and whose telephone number is: (404) 881-2324.

24 FLRA No. 97

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

INTERNAL REVENUE SERVICE

Respondent

and

Case No. 3-CA-40436

NATIONAL TREASURY EMPLOYEES UNION

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority because the Respondent filed exceptions to the attached Decision of the Administrative Law Judge. The issue concerns whether the Respondent violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by implementing a program entitled "Instructor Opportunities with Historically Black Colleges and Universities" (instructor program) without providing the Charging Party prior notice and an opportunity to negotiate over impact and implementation. The Respondent filed exceptions to the Judge's decision; however, the General Counsel and the Charging Party filed neither exceptions nor oppositions to the Respondent's exceptions.

II. Background

As the pertinent facts in this case are fully set forth in the Judge's Decision, they will be discussed only as relevant. The Charging Party is the exclusive bargaining representative for a unit of employees who are among those given the opportunity to apply for the instructor program. As described by the Judge, and undisputed, the Respondent announced and implemented the instructor program without providing prior notice to the Charging Party and the

Respondent thereafter refused to negotiate concerning the instructor program. The Respondent implemented the program in five of its seven regions. In the absence of any Historically Black Colleges and Universities (HBCUs) with accounting curricula, the other two regions did not participate in the instructor program. Under the instructor program the Respondent continues to be responsible for salary, leave administration, contributions to funds for retirement, the insurance and health benefits, travel expenses, and withholding of Union dues; however, instructors have a "supervisor" at the institution where they are assigned. Individuals serve as instructors anywhere from three to nine months and then return to their position with the Respondent.

III. Judge's Decision

The Judge found that the Respondent violated section 7116(a)(1) and (5), concluding that, while the instructor positions were outside the bargaining unit, the Union had the right to bargain on behalf of unit employees as to procedures used to implement the instructor program and the impact upon adversely affected unit employees. Further, the Judge found that the impact of the implemented change (the instructor program) was more than de minimis, noting the potential impact on employees selected and possible workload impact on other employees. Finally, the Judge rejected the contention that a duty to bargain existed concerning the conditions of employment of unit employees while they were serving as instructors.

IV. Exceptions

The Respondent argues that no duty to bargain exists with respect to matters which apply to an employee who is on detail to a non-bargaining unit position. The Respondent also excepts to the Judge's conclusions regarding impact, particularly those concerning the possible impact on the workload of other employees and the impact on selectees when they return. Finally, Respondent excepts to the Judge's statement that the parties' negotiated agreement might cover employees while detailed to serve as instructors.

V. Analysis

We find in agreement with the Judge, that the Respondent was obligated to give the Union prior notice and an opportunity to negotiate over the impact and implementation of the instructor program and that its failure to do so violated section 7116(a)(1) and (5). The Respondent's exception alleging an absence of a duty to bargain with respect to matters which apply to employees while on detail to nonbargaining unit positions is inapposite: the Judge did not find that the duty to bargain extended to matters concerning the employees while on detail to such positions. Rather, she found that the obligation to bargain was limited to the impact and implementation of the instructor program as it affected the bargaining unit and bargaining unit employees.

With respect to the Respondent's contention that any change in conditions of employment was de minimis, we agree with the Judge that implementation of the instructor program resulted in a change in conditions of employment having an impact or a reasonably foreseeable impact on bargaining unit employees which gave rise to a duty to bargain. The Authority recently has reassessed and modified the de minimis standard previously used to identify changes in conditions of employment which require bargaining. Under the revised standard, we place principal emphasis on such general areas of consideration as the nature and extent of the effect or reasonably foreseeable effect of the change on conditions of employment of bargaining unit employees. Department of Health and Human Services, Social Security Administration, 24 FLRA No. 42 (1986).

In this case we note that the instructor program was a continuing one implemented and available to unit employees in five of the Respondent's seven regions. While generally deemed by all to be beneficial to the career of employees selected for participation, it had the effect of removing those employees from their work with the Respondent for three to nine months. Given the extended nature of such absences we find it reasonable to conclude that the program could have a foreseeable impact on the workload of remaining employees as well as on the selected employees' ability to perform their duties upon return to their bargaining unit positions. Additionally, inasmuch as the record reveals that selection for participation in the instructor program was considered by employees, in general, to be desirable and career enhancing, a conclusion that actions related to such selection could have a foreseeable impact on bargaining unit employees is reasonable.

We find that the Judge's conclusion that it was "reasonably foreseeable" that implementation of the instructor program would have an impact on bargaining unit employees the nature and extent of which would require bargaining is supportable. We reject the Agency's argument to the contrary.

Finally, we find it unnecessary to pass upon the Agency's exception to the Judge's statements regarding the applicability of the parties' negotiated agreement. A determination of the extent to which the negotiated agreement may be applicable is not necessary to conclude that the Respondent's actions in implementing the instructor program violated section 7116(a)(1) and (5) of the Statute. Moreover, the Judge did not rely on any provisions of the negotiated agreement to support her conclusions that the Respondent had violated the Statute.

VI. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, we have reviewed the rulings of the Judge made at the hearing, find that no prejudicial error was committed, and affirm those rulings. We have considered the Judge's Decision and the entire record, and adopt the Judge's findings, conclusions and recommended Order only to the extent that they are consistent with our decision.

ORDER

Pursuant to section 2423.29 of the Rules and Regulations and section 7118 of the of the Federal Labor Management Relations Statute, it is hereby ordered that the Internal Revenue Service shall:

1. Cease and desist from:

(a) Failing and refusing to give notice to the National Treasury Employees Union, and affording it an opportunity to bargain, to the extent consonant with law, before implementing any program that adversely affects any employees for whom it is the exclusive representative.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Notify the National Treasury Employees Union of the proposed implementation of any program that adversely affects employees for whom it is the exclusive representative and, prior to implementation of any such program, afford the Union an opportunity to bargain concerning it, to the extent consonant with law.

(b) Bargain, upon request, with the Union over procedures which management will use in implementing the Program entitled "Instructor Opportunities with Historically Black Colleges and Universities" and appropriate arrangements for employees it represents and who are adversely affected by the program.

(c) Post in every region where it implemented the program entitled "Instructor Opportunities with Historically Black Colleges and Universities" copies of the attached Notice to All Employees on forms to be furnished by the Regional Director, Region III of the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the Regional Commissioner and shall be posted and maintained for sixty (60) consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Regional Commissioner shall take all reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to 5 CFR § 2423.30, notify the Regional Director, Region III, in writing, within 30 days of the date of this Order as to what steps have been taken to comply herewith.

Issued, Washington, D.C. December 31, 1986.

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to give notice to the National Treasury Employees Union and afford it an opportunity to bargain, to the extent consonant with law, before implementing any program that adversely effects any employees for whom it is the exclusive representative.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce any of our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL notify the National Treasury Employees Union of the proposed implementation of any program that adversely affects employees for whom it is the exclusive representative and, prior to implementation of any such program, afford the Union an opportunity to bargain concerning it, to the extent consonant with law.

WE WILL bargain, upon request, with the National Treasury Employees Union, over procedures which management will use in implementing the program entitled "Instructor Opportunities with Historically Black Colleges and Universities" and appropriate arrangements for employees it represents and who are adversely affected by the program.

____
(Activity)

Dated: __________ By: ______________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region III, whose address is: 1111 18th Street, NW., Room 700, P.O. Box 33758, Washington, D.C. 20033-0758, and whose telephone number is: (202) 653-8500.

(24 FLRA No. 97)

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

INTERNAL REVENUE SERVICE :

Respondent :

and : Case No. 3-CA-40436

NATIONAL TREASURY EMPLOYEES UNION :

Charging Party/Union :

. . . .

Nancy J. Crawford,
For the Respondent

Patricia Eanet Dratch,
For the General Counsel
Federal Labor Relations Authority

Before: ISABELLE R. CAPPELLO
Administrative Law Judge

DECISION

This is a proceeding under Title VII of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1191, 5 U.S.C. 7101 et seq. (1982), commonly known as the Federal Service Labor-Management Relations Statute, and hereinafter referred to as the Statute, and the rules and regulations issued thereunder and published at 5 CFR 2411 et seq.

Pursuant to a charge of unfair labor practices filed on June 8, 1984, by the Charging Party (also referred to as NTEU or the Union), the Regional Director of Region III of the Federal Labor Relations Authority (hereinafter, the Authority) investigated and, on July 25, served the complaint initiating this proceeding.

The complaint alleges that Respondent implemented a program affecting bargaining unit employees "without providing the Union prior notice and an opportunity to negotiate over the impact and implementation of this change in bargaining unit employees' working conditions" (G.C. Exh. 1(c), para. 7).[1] The program is entitled "Instructor Opportunities with Historically Black Colleges" (hereinafter referred to as the Program). The complaint alleges that this unilateral implementation violated sections 7116(a)(1) and (5) of the Statute.[2]

Respondent admits that it implemented the Program, in or about March 1984, but denies that this program "affected a change in bargaining unit employees' working conditions, affected bargaining unit employees or required notice to negotiate over impact and implementation" (G.C. Exh. 1(e), para. 7). Respondent denies violating the Statute.

A hearing was held on October 23, 1984 in Washington, D.C. The parties appeared, adduced documentary evidence, and examined witnesses. Briefs were filed by the General Counsel, on November 21, and by the Respondent on November 23. Based upon the record made in this case, my observation of the demeanor of the witnesses, and the briefs, I enter the following findings of fact and conclusions of law and recommend the entry of the following order.

Findings of Fact

1. At all times material herein, the Union is and has been a labor organization and Respondent, an agency, within the meaning of sections 7103(a)(4) and (3), respectively, of the Statute.

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[1] "G.C. Exh." refers to the exhibits of the General Counsel. Other abbreviations used herein are as follows. "Tr." refers to the transcript. "Jt. Exh." refers to joint exhibits. "R. Exh." refers to the Respondent's exhibits. "G.C. Br." refers to the brief of the General Counsel and "R. Br." to that of Respondent. Corrections to the transcript are made pursuant to 5 CFR 2423.19(r) and are attached to this decision.

[2] 5 U.S.C. 7116(a)(1) and (5) provide as follows:

> (a) For the purposes of this chapter, it shall be an unfair labor practice for an agency--
>
> (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter; . . . [or]
>
> (5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter . . . .

2. At all times material herein, the Union has been certified "as the exclusive representative of all professional and nonprofessional employees of Internal Revenue Service, district, region and National Office, excluding professional employees of the North Atlantic Regional Office, management officials, supervisors, confidential employees, all employees of the Criminal Investigation Division, all employees engaged in Federal Personnel work in other than clerical capacity, and guards." See Jt. Exh. 1.

3. At all times material herein, the following persons occupied the positions set opposite their names and have been and are supervisors or management officials, within the meaning of sections 7103(10) and (11) of the Statute, and agents of Respondent also referred to herein as IRS:

Paul D. Howland	- Acting Chief, Labor Relations Branch, Washington, D.C.
Arleen Lopes	- Labor Relations Specialist, Washington, D.C.
Jean Henry	- Central Region Coordinator of Historically Black Colleges and Universities

4. Peter Stehmer, a Tax Administration Advisor for IRS, was assigned, approximately one and one-half years ago, as National Coordinator for the Historically Black Colleges and Universities (HBCU) faculty support initiative through the Tax Administration Advisory Services (TAAS). This Program is a result of Executive Order 12320 signed by President Reagan on September 15, 1981. This Executive Order addresses increased participation by HBCU in federally sponsored programs. The purpose of this Executive Order is to advance the development of human potential by strengthening the capacity of HBCU to provide education to overcome the effects of discriminatory treatment. The program seeks to identify, reduce and eliminate barriers which may have unfairly resulted in reduced participation by blacks in, and reduced benefits received by blacks from, federally sponsored programs,

5. The Intergovernmental Personnel Act (IPA) of 1970, Public Law 91-648, 91st Congress, S. 11, January 5, 1971, is used to implement the HBCU program. The IPA creates a contract between the educational institution and the IRS to provide instruction at the school. See R. Exh. 3. The IRS employee assigned to perform the instruction is not a party to the contract. The IPA involves an exchange of expertise between government agencies and public or private institutions, including educational institutions. Many aspects of IPA assignments are governed by regulations published by the Office of Personnel Management.

Through the HBCU Executive Order, IRS can provide assistance to educational institutions by furnishing instructors on a nonreimbursable basis. Previous assistance was reimbursable. The purpose of the Program is to lend instructional assistance in tax and accounting to the educational institution and to afford the IRS an opportunity to recruit qualified students for its positions.

6. In March 1984, Mr. Stehmer and Linda Martin, Chief Problem Resolution Staff, met with David Goldberg, Chief, Performance Evaluation and Promotion Programs Section, Employment Branch, Patricia Francis, Chief of Affirmative Action, Equal Employment Opportunity, and Ms. Lopes, to discuss the development of this Program. Ms. Lopes was there "to look at any potential impact on bargaining unit employees so that if it was appropriate to notify the union and to bargain that that would be done" (Tr. 92). Ms. Lopes left the meeting to discuss the matter with John Rubin, a Labor Relations Specialist in the Labor Relations Branch, Contract Administration Section, "the resident expert on bargaining unit status" (Tr. 94-95). Mr. Rubin made the judgment that the employees assigned by IRS as instructors at a HBCU would not be in the bargaining unit. He made this judgment on the basis of being given "a broad description of the program, a broad description of the instructor position" (Tr. 81), "[j]ust the broad facts of the program, of our employees volunteering to teach at historically black colleges and their jobs there and a little bit of the selection process in that the - at least as far as she has told me that they would be selected by the colleges" (Tr. 82). This Specialist did not know that IRS selected the employees to be interviewed by the HBCU. He did not know that IRS continued to control their leave. Nevertheless, he testified that, "regardless of anything," he would have come to the same conclusion because the IRS was not in control of the day-to-day activities of the employees at the HBCU (Tr. 84).

7. Not only does IRS control the leave of its employees and the selection process by which a list of three employees is submitted to the HBCU for final selection, IRS also requires the employees selected to report all leave taken while at the HBCU to an IRS timekeeper. IRS and the HBCU enter into an agreement which sets out the employee's position title; designates the employee's immediate supervisor at the HBCU; and lists the courses the employee is to teach. IRS bears all the costs of the assignment. IRS continues to make salary payments and employer contributions to funds for retirement, life insurance and health benefits. IRS reimburses selected employees for travel expenses incurred in connection with assignments to HBCU and provides them with travel advances. Selected employees who are on union dues withholding are continued in this status while assigned to the HBCU. Selected employees, while assigned to the HBCU, earn seniority at their IRS jobs and receive all notices of vacancies, promotions and training opportunities and all technical updates and digests of IRS changes.

8. The IPA provides that agency employees assigned under it are "[o]n detail" and "a temporary assignment" (R. Exh. 3). Regulations promulgated under the IPA provide that: "The detailed employees pay, allowances, privileges, rights, seniority, and other benefits are preserved and remain in effect during the assignment" (R. Exh. 7, para. 3.3(b). . . ."

9. Details of Respondent's employees to HBCU run anywhere from three to nine months, after which the employee returns to his former IRS position. IRS "does a lot of detailing" and has always treated detailed employees "as members of the bargaining unit." See Tr. 23.

10. After the March 1984 meeting (see finding 6, above), Mr. Stehmer advised the IRS regions to advertise, screen and refer employees to the regional HBCU participating in the Program. The Program was implemented nationwide with participation by five of the seven IRS regions. No notice was given to the Union.

11. The Union's Assistant Director of Negotiations, Joseph Kaplan, first learned of the Program in a phone call from the NTEU Chapter President in Indianapolis, who had seen an IRS leaflet advertising it. On May 8, 1984, Mr. Kaplan contacted Ms. Lopes concerning the Program. In that conversation Mr. Kaplan requested negotiations and was informed by Ms. Lopes that IRS would not negotiate with NTEU because the positions were not bargaining unit positions. In that conversation Mr. Kaplan requested IRS return to the status quo ante and provide NTEU with an opportunity to negotiate. This conversation was confirmed in a letter dated June 5, 1984, from Mr. Kaplan to Paul D. Howland. In a letter dated June 26, 1984, Mr. Howland responded to Mr. Kaplan's letter of June 5th. He reiterated IRS's position that the HBCU opportunities were non-bargaining unit positions and that IRS had no obligation to negotiate with the Union over the instructor opportunities. IRS did indicate a willingness to "discuss" with the Union any "concerns" involving the Program and "to the extent [it could], give them due consideration." See Jt. Exh. 4). The Union subsequently filed the charge leading to this proceeding.

12. In two of IRS's seven regions, there were no HBCU with accounting curricula; and so those two did not participate in the Program. In the other five, IRS representatives, in four, screened between 10 to 25 applicants, in each region, and selected 3 to be interviewed by the particular HBCU in that region. The HBCU made the final Selection. In one region, the Southwest Region, the HBCU "right up-front asked for a certain person" (Tr. 72); and no prescreening was done of the applicants. Ultimately, five bargaining unit employees were selected to participate in the Program out of the total of seven or eight IRS employees who were detailed as Instructors to a HBCU. IRS criteria for selection were, at least, a masters degree or a CPA, basic instructor training, equal employment opportunity consciousness, sensitivity awareness, and "meet-and-deal qualities," to help with recruitment efforts (Tr. 66). Volunteers for the Program were interviewed by panels of top IRS officials. The interviews lasted 35 to 45 minutes.

13. "[B]eneficial changes" resulted from the details to the Program (Tr. 69). The Program Coordinator established that "if somebody teaches for, let's say, six to nine months at an HBCU, and it certainly looks good

on your statement of accomplishment, so that would be a positive type factor" with "potential benefits to the person in that detail" (Tr. 69-70). An "assignment" to an HBCU is "attractive" to employees and IRS gets "many more applicants than [it] can handle" (Tr. 70). Selection as an Instructor at a HBCU enhances promotional ability and demonstrates management's confidence in the employee's ability to perform and enhance the IRS's image with the public.

14. Two employees testified who had volunteered for the Program and not been selected by the HBCU. Both received laudatory memoranda from IRS's Regional Commissioner, Central Region. The Regional Commissioner thanked them for their "interest" in the Program, and encouraged them to continue to seek ways in which their talents could be used to further other special programs. See G.C. Exh. 3 and 4.

15. The Union wished to negotiate such matters as the selection techniques for the teaching positions insofar as they were within the control of Respondent; the announcement to employees of the opportunity for these positions, including what information it would contain and how it would be distributed; what time period employees would have to apply; the grievable rights for nonselected employees, and for selected employees with pending grievances or grievances while at the HBCU; how leave would be handled for the selected employees, including who to ask for leave and the carryover; how a reduction in force would affect selected employees insofar as it would concern bumping and retreat rights and competitive areas; dues withholding for selected employees; retraining for selected employees when they return to their former duties; a moratorium on the selected employees' evaluation, after their return and pending their becoming reacquainted with their duties, or just a provision that management will consider that they have been away on the detail when they next come up for evaluation; timely notice to selected employees of promotional opportunities and an opportunity to be interviewed; and access to union officers and stewards for selected employees, while they are at their teaching posts. Even if the selected employees were found to be outside the bargaining unit, while at their teaching posts, the Union wished to negotiate "taking them out and putting them back in" (Tr. 30).

16. Ms. Lopes conceded that, upon selection of an employee to serve as an Instructor, "there could be additional work placed on the remaining employees in that office" (Tr. 100-101).

Discussion and Conclusions

The General Counsel has established, by a preponderance of the evidence,[3] that Respondent violated section 7116(a)(1) and (5) of the Statute when it implemented a program entitled "Instructor Opportunities with Historically Black Colleges," without providing the Union with prior notice and an opportunity to negotiate over the implementation procedures and the impact upon adversely affected, bargaining unit employees.

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[3] This is the statutory burden of proof. See 5 U.S.C. 7118(a)(7) and (8).

1. While unit employees selected for the Instructor position do not remain in the bargaining unit while actually serving at the educational institution, as will be discussed in part 2, below, the Union does have the right to bargain on their behalf, and on behalf of all unit employees, as to procedures used to implement the Program and the impact upon adversely affected unit employees, while serving in the unit. See section 7106(b)(2) and (3) of the Statute[4] and Internal Revenue Service, 13 FLRA 366 (1983).

Impact that is actual or reasonably foreseeable, and "results in a more than de minimis impact," triggers the bargaining obligation. See Internal Revenue Service, 16 FLRA 845, 846 (1984). Here, the impact is felt by nonselected, unit employees in that their work record will not contain this teaching opportunity. Respondent's Program Coordinator conceded that selection as an Instructor is a beneficial type of accomplishment with potential benefits to the detailed person; and this is an understatement. For example, Respondent's Regional Commissioner for the Central Region wrote laudatory memoranda to unit employees who volunteered and were not even selected, ultimately, by the educational institution. Receiving praise from the top management official in an IRS region surely will enhance an employee's promotion potential. And being actually selected as an Instructor would surely enhance it even more. Such enhancement of promotional ability, or missing the opportunity for it, cannot be dismissed as a de minimis matter. Thus, such matters as how the announcement of this opportunity is made, and to whom, and what time period the employees have to apply, are procedures which the Union, legitimately, wished to negotiate. See finding 15, above.

It is also reasonably foreseeable that the workload of unit employees could be increased by the absence of the selectee for a period that could extend for nine months.

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[4] Section 7106 provides in pertinent part, that:

> (b) Nothing in this section shall preclude any agency and any labor organization from negotiating - . . .
>
> . . .
>
> (2) procedures which management officials of the agency will observe in exercising any authority under this section; or
>
> (3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

And an adverse impact is also reasonably foreseeable as to selectees returning to their IRS positions after an absence of as long as nine months. Although a selectee returns to his or her same IRS "position," there is no guarantee that the return will be to an IRS position in the same unit, under the same supervisor. A selectee, after nine months, may need some refresher training upon return to his or her former position. A reduction in force could take place during a selectee's absence which might have affected the selectee's bumping and retreat rights. These are the types of adverse impacts which the Union might wish to negotiate on behalf of the selectees, upon their return from the educational institutions. See finding 15, above.

Taken together, these impacts cannot, fairly, be denominated as "trivial, insignificant, speculative, opinion, or at most, de minimis," as Respondent argues. See R. Br. 28. Decisions of the Authority cited by Respondent, wherein a de minimis impact was found, are factually distinguishable and of little assistance in resolving the issues here. In Department of Health and Human Services, Social Security Administration, Chicago, Chicago Region, 15 FLRA No. 174, 15 FLRA 922, 924 (1984), cited at page 21 of Respondent's brief, a change merely separated a review from an authorization function of Claims Representatives, with no effect on grade qualifications, work functions, or other working conditions, and did not change the way reviews were distributed, fraud investigations were conducted, or errors reported to supervisors.

The decision in Office of Program Operations, Field Operations, Social Security Administration, San Francisco Region, 5 FLRA No. 45, 5 FLRA 333 (1981) cited at pages 21, 26 and 28 of Respondent's brief, is more factually close, but still distinguishable. In that case, one employee was temporarily detailed, for the three or four months; and six volunteers took turns in performing his field duties, which they enjoyed and had previously done under an established past practice; their workload was not increased; their duties were the same; and their working conditions were unchanged. Only one volunteer left the office on any particular day and the procedure was in effect only three days a week. The work of the volunteer, on his or her day in the field, was diffused among 10 others and a supervisor, who took over when the workload in the office became heavy.

In Department of Health and Human Services, Social Security Administration, Bureau of Field Operations, San Francisco, California, 12 FLRA No. 30, 12 FLRA 108, 115 (1983), some 100-120 employment cases were transferred to one office, but they were to be worked into the workload, of primarily one employee, but only "as she had time," with no consequences for late processing.

2. It is well established that an agency has no duty to bargain as to employees or positions outside the bargaining unit. See American Federation of Government Employees, National Council of Social Security Administration, Field Operations Locals, AFL-CIO (hereinafter, AFGE), 17 FLRA 11, 12 (1985), wherein the Authority held that union proposals were

nonnegotiable because they concerned agency employees while they were detailed to agency Depot Collections Centers; and it was unrefuted that the Union did not hold exclusive recognition for employees so detailed.

Here, of course, the Union does refute management's allegation that the selectees are outside the bargaining unit. Looking at the collective bargaining agreement between the parties, it is seen that it simply states coverage for "all professional and nonprofessional employees of Internal Revenue Service . . . ." See finding 2, above. Respondent concedes that the selectees for the Instructor positions remain "employees of Internal Revenue Service." See R. Br. 11, 16 and 18. Thus, the contract itself appears to be sufficiently broad to cover the selectees while on duty at the educational institutions; and I note that Respondent feels unsure enough of its contrary position that it continues dues-withholding of union members while detailed to the educational institutions. See finding 7, above. Respondent relies on Article 7 of the contract to support its position. But this Article, dealing with "Promotions/Other Competitive Actions" also seems sufficiently broad to cover these details, in that it covers "all competitive promotions to bargaining unit positions and certain other placement actions as set forth in Section 2," (Jt. Exh. 1, Section 1, page 5, emphasis added). Section 2 of Article 7 sets forth specific, placement actions to which the Article does not apply and then states it will apply "to all other placement actions" (Jt. Exh. 1, Section 2B, page 5). Placement in an educational institution is not specifically excluded. And the manner in which IRS screened the applicants for the Instructor positions certainly sounds "competitive" enough to qualify as an Article 7 placement. See finding 12, above.

However, Respondent also relies upon language in the Statute itself and, particularly, section 7103(a)(2)(A) which defines an "employee" as "an individual employed in an agency;" section 7103(a)(3) which defines an "agency" as "an Executive Agency;" section 7103(a)(12) which defines the "collective bargaining" which a union may undertake on behalf of employees as applying to "employees in an appropriate unit in the agency" and "with respect to the conditions of employment affecting such employees;" and section 7106(a)(14) which defines "conditions of employment" as meaning "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions."

While not free from doubt, I believe that Respondent is probably correct in arguing that the Statute was not intended to apply to IRS employees while they are employed in educational institutions and come under the control of those institutions, insofar as their day-to-day activities are concerned. During these prolonged details, many of the conditions of employment about which the Union might wish to bargain are not within the control of IRS, for example, changes in office facilities, parking and cafeteria privileges, hours of work, number and size of classes, and deadlines on grading papers. Since IRS employees selected as Instructors include nonbargaining unit employees (see finding 12, above),

any Union proposals potentially affecting these nonbargaining unit employees would be outside the duty to bargain by IRS. See AFGE, above and International Federation of Professional and Technical Employees, AFL-CIO, NASA Headquarters Professional Association, 8 FLRA 212, 215 (1982). The impracticality of the Union's being thus able, effectively, to represent the Instructors while on these details is persuasive that Congress did not intend for the Statute's reach to extend to such situations, and that the statutory language limiting coverage to employees "employed in an agency" should be construed literally.

Ultimate Findings and Order

Respondent has violated section 7116(a)(1) and (5) of the Statute, as alleged in the complaint.

Accordingly, and pursuant to 5 U.S.C. 7118 and 5 C.F.R. 2423.29, the Authority hereby orders that the Internal Revenue Service shall:

1. Cease and desist from:

(a) Failing and refusing to give notice to the National Treasury Employees Union, and affording it an opportunity to bargain, to the extent consonant with law, before implementing any program that adversely affects any employees for whom it is the exclusive representative.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Notify the National Treasury Employees Union of the proposed implementation of any program that adversely affects employees for whom it is the exclusive representation and, prior to implementation of any such program, afford the Union an opportunity to bargain concerning it, to the extent consonant with law.

(b) Bargain, upon request, with the Union over procedures which management will use in implementing the Program entitled "Instructor Opportunities with Historically Black Colleges" and appropriate arrangements for employees it represents and who are adversely affected by the Program.

(c) Post in every region where it implemented the Program entitled "Instructor Opportunities with Historically Black Colleges" copies of the attached Notice to All Employees on forms to be furnished by the Regional Director, Region III of the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the Regional Commissioner and shall be posted and maintained by him or her for sixty (60) consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Regional Commissioner shall take all reasonable steps to insure that such notice are not altered, defaced, or covered by other material.

(d) Pursuant to 5 CFR 2423.30, notify the Regional Director, Region III, in writing within 30 days from the date of this Order as to what steps have been taken to comply herewith.

Isabelle R. Cappello
ISABELLE R. CAPPELLO
Administrative Law Judge

Dated: April 12, 1985
Washington, D.C.

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to give notice to the National Treasury Employees Union and afford it an opportunity to bargain, to the extent consonant with law, before implementing any program that adversely affects any employees for whom it is the exclusive representative.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce any of our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL notify the National Treasury Employees Union of the proposed implementation of any program that adversely affects employees for whom it is the exclusive representation and, prior to implementation of any such program, afford the Union an opportunity to bargain concerning it, to the extent consonant with law.

WE WILL bargain, upon request, with the National Treasury Employees Union, over procedures which management will use in implementing the Program entitled "Instructor Opportunities with Historically Black Colleges" and appropriate arrangements for employees it represents and who are adversely affected by the Program.

____
(Agency or Activity)

Dated: ____________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region III, whose address is: 1111-18th Street, N.W., Suite 700, P.O. Box 33758, Washington, D.C. 20033-0758 and whose telephone number is: (202) 653-8500.

24 FLRA No. 98

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WICHITA DISTRICT, WICHITA, KANSAS

Respondent

and

Case No. 7-CA-30514
23 FLRA No. 89

NATIONAL TREASURY EMPLOYEES UNION

Charging Party

ORDER DISMISSING MOTION FOR RECONSIDERATION

This matter is before the Authority on a request for reconsideration filed by the Respondent on December 12, 1986, seeking reconsideration of the above-entitled Authority's Decision and Order on Remand of October 22, 1986. For the reason set forth below, the Respondent's motion must be dismissed.

Section 2429.17 of the Authority's Rules and Regulations, provides in pertinent part:

> 2429.17 Reconsideration.
>
> After a final decision or order of the Authority has been issued, a party to the proceeding before the Authority who can establish in its moving papers extraordinary circumstances for so doing, may move for reconsideration of such final decision or order. The motion shall be filed within ten (10) days after service of the Authority's decision or order. . . .

The Authority's Decision and Order on Remand was dated and served on the Respondent by mail on October 22, 1986. Therefore, under section 2429.17 of the Authority's Rules and Regulations, and sections 2429.21 and 2429.22, which also are applicable to computation of the time limit here involved, the Respondent's motion for reconsideration was due in the national office of the Authority before the close of business on November 10, 1986. Since, as indicated above, the Respondent's motion was not filed until December 12, 1986, it is clearly untimely and must be dismissed.

Accordingly, for the reason set forth above, and apart from other considerations, the Respondent's motion for reconsideration is hereby dismissed.

For the Authority.

Issued, Washington, D.C., December 31, 1986.

Harold D. Kessler

Harold D. Kessler
Director of Case Management

24 FLRA No. 99

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS 832D COMBAT
SUPPORT GROUP, DPCE
LUKE AIR FORCE BASE, ARIZONA

Respondent

Case No. 8-CA-50167

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1547

Charging Party

DECISION AND ORDER

I. Statement of the Case

This unfair labor practice case is before the Authority because of exceptions filed by the Respondent to the attached decision of the Administrative Law Judge. The Charging Party (the Union) filed an opposition to the exceptions. The complaint alleges that the Respondent violated section 7116(a) (1), (5) and (8) of the Federal Service Labor-Management Relations Statute (the Statute) by failing to comply fully with an Arbitrator's award to which no timely exceptions were filed pursuant to section 7122 of the Statute and which therefore had become final and binding. The Judge concluded that the Respondent violated section 7116(a)(1) and (8) of the Statute by failing to comply with the Arbitrator's award. Although finding the complaint to have been timely filed for reasons which differ from the Judge's, the Authority agrees with his conclusion as to the violation by the Respondent.

II. Background

On September 23, 1983, Arbitrator David Goodman issued an award in which he found that the Respondent had violated the parties' collective bargaining agreement when it transferred two employees from the "swing shift" to day shift assignments, which resulted in the employees' loss of night differential (premium pay). While the Arbitrator did not expressly state that the employees who were improperly reassigned were to be reimbursed for their lost premium pay, he did order a return to the status quo. The Respondent reassigned the employees to their prior shift, but took the position that the award did not require the payment of backpay. On January 3, 1984, the Union filed an unfair labor practice (ULP) charge alleging that the Respondent had failed to fully comply with the Arbitrator's award. The Union subsequently sought clarification of the award from the Arbitrator. On March 1, 1984, the Arbitrator advised the parties that the only meaning that could be applied to his status quo requirement was that the employees be paid for the premium pay they lost when they were denied access to the swing shift. On March 30, 1984, the Respondent filed exceptions to the Arbitrator's clarification with the Authority. On or about April 23, 1984, the Union then withdrew its first ULP charge and on the same day filed a second, essentially identical charge. On July 13, 1984, the Regional Director dismissed the Union's second ULP charge because of the Respondent's pending exceptions to the Arbitrator's award then before the Authority.

On July 27, 1984, the Authority issued its decision in American Federation of Government Employees, Local Union 1547 and Department of the Air Force, Luke Air Force Base, Arizona, 15 FLRA 399 (1984). The Authority held that the Arbitrator's clarification did not constitute a modification of the original award, but that it was merely a reiteration of an issue originally covered in the award. The Authority held that exceptions, to be timely, had to be filed within 30 days after the original award and that the Respondent's exceptions, filed some six months after the award, were therefore untimely.

On August 1, 1984, the Union appealed to the General Counsel concerning the Regional Director's dismissal of its second ULP charge. At a meeting held on or about September 5, 1984, the Respondent advised the Union that, in its view, the Authority's denial of its exceptions did not require the payment of backpay to the affected employees. The Union filed its third ULP charge on September 10, 1984. On September 14, 1984, the Union asked for written confirmation of the Respondent's position as to backpay. On September 17, 1984, the Respondent took the position that it would not comment on the merits of the backpay issue pending the resolution of the Union's appeal to the General Counsel of the Regional Director's July 13 denial of the Union's earlier ULP charge. On October 31, 1984, the General Counsel affirmed the Regional Director's dismissal of the Union's second charge. On January 3, 1985, the Union withdrew the third charge it had filed in September 1984, and sent the Respondent a letter reiterating its view that full compliance with the Arbitrator's award required the payment of backpay to the affected employees. At a meeting held on January 10, 1985, the Respondent again took the position that the award did not require the payment of backpay. On February 11, 1985 the Union filed its fourth ULP charge leading to issuance of the complaint in the present case.

III. The Administrative Law Judge's Decision

The Judge concluded that the Respondent failed to comply with section 7122 of the Statute, in violation of section 7116(a)(1) and (8) of the Statute, when it failed to pay the backpay awarded by the Arbitrator. The preliminary issue addressed by the Judge was whether the Union's fourth charge was timely filed under section 7118(a)(4)(A) of the Statute, which precludes issuance of a complaint "based on any alleged unfair labor practice which occurred more than 6 months before the filing of the charge with the Authority." The Judge found that it was not clear that an actionable charge alleging a refusal to fully comply with the award could have been filed before the Authority denied the Respondent's untimely exceptions, that is, before July 27, 1984. The Judge reasoned that a charge filed before that date would have been dismissed because of a lack of awareness of what the Arbitrator had actually ordered.

Using July 27, 1984, as the starting date for the 6-month period for filing a ULP charge, the Judge recognized that the February 11, 1985 charge was filed after that period expired. However, the Judge found that the situation in this case was analogous to situations in private sector cases involving "continuing violations" of the National Labor Relations Act. The Judge also reasoned that the policy underlying the statutory time limit, to protect respondents against stale claims, would not be offended by finding the charge to be timely. The Judge found that the uncertainties of redress and the Union's diligent pursuit of its claim furnished equitable reasons not to dismiss the charge as raising a stale claim. For those reasons, the Judge recommended that the Authority find that the Union's February 11, 1985 charge in this case was not time-barred by section 7118(a)(4)(A).

In response to the Union's request to be reimbursed for its expenses, including legal fees incurred in pursuing this case, the Judge concluded that such relief would only be available pursuant to the Back Pay Act following the final resolution by the Authority.

IV. Positions of the Parties

In its exceptions, the Respondent contends that the Judge erred in concluding that the Union's unfair labor practice charge was not time-barred by section 7118(a)(4)(A). The Respondent also excepts to "the Judge's implicit holding" that the charge was based on a continuing violation. The Respondent agrees with the Judge that the time for filing a charge began on July 27, 1984, the date the Authority dismissed the Respondent's exceptions to the Arbitrator's award. The Respondent argues that the charge filed on February 11, 1985 was untimely and that the Judge's equitable reasons for finding to the contrary are unsupportable. The Respondent further contends, based on its interpretation of the Arbitrator's award of September 23, 1983, that it fully complied with the award, but that if the award included a backpay remedy, the remedy is contrary to the Back Pay Act. In its opposition to the Respondent's exceptions, the Charging Party argues generally in support of the Judge's rationale, and also argues for alternative dates to support the finding that the charge in this case was timely filed.

V. Analysis

We agree with the Judge that the Respondent failed to comply with section 7122(b) of the Statute, in violation of section 7116(a)(1) and (8), when it refused to pay the affected employees the backpay awarded by the Arbitrator. We also agree with the Judge's finding that the Union's unfair labor practice charge was not time-barred by section 7118(a)(4)(A) of the Statute. However, our timeliness determination is based on somewhat different reasons.

A. Timeliness

Section 7122(b) of the Statute provides "If no exception to an arbitrator's award is filed . . . during the 30-day period beginning on the date of such award, the award shall be final and binding. An agency shall take the actions required by an arbitrator's final award." The Arbitrator's award involved in this case was dated September 23, 1983. The Respondent did not file exceptions to the award within 30 days of that date. Therefore, the award became final and binding for compliance purposes on October 23, 1983, by operation of section 7122(b). Moreover, notwithstanding the Respondent's interpretation of the award, the Arbitrator remedied the loss of night differential pay of the affected employees which resulted from the Respondent's violation of its collective bargaining agreement with the Union.

It is well established that an agency is obligated to comply with an arbitration award to which timely exceptions have not been filed and any failure to comply with an award under such circumstances constitutes an unfair labor practice. *United States Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 15 FLRA 151 (1984), *affirmed*, *Department of the Air Force v. FLRA*, 775 F.2d 727 (6th Cir. 1985).

Under section 7118(a)(4) of the Statute an unfair labor practice charge must be filed within 6 months of the occurrence of the alleged ULP. In this case, the 6-month period for filing a ULP charge alleging that the Respondent failed to fully comply with the Arbitrator's award commenced on October 23, 1983, when the award became final and binding. The Authority has determined that for equitable reasons the running of the 6-month period was suspended during the pendency of the three separate ULP charges filed by the Union in this matter on or about January 3, April 23 and September 10, 1984, and that the fourth charge filed on February 11, 1985 was timely.

The Supreme Court has held that equitable principles are applicable to time limits specifically established by statute. *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959); *Burnett v. New York Central R.R. Co.*, 380 U.S. 424 (1965); *American Pipe and Construction Co. v. Utah*, 414 U.S. 538 (1974). Specific statutory time limits are subject to modification on equitable grounds in certain circumstances. For example, where a party did not sleep on its rights but brought a timely action in a state court rather than the appropriate Federal court, the statutory time limit was tolled by the filing of the state action. *See Burnett*. The statutory time limit was also tolled or suspended where such action was not inconsistent with the legislative history of the particular statute. *See American Pipe*.

Applying the rationale of the Supreme Court in the above-cited decisions, we find that suspension of the 6-month filing period is not inconsistent with the legislative history of the Statute in the unique circumstances of this case. There is nothing in the legislative history of section 7118(a)(4)(A) that precludes the application of equitable principles in computing the time period. In fact, suspension of the time period in this case is consistent with the intent of Congress reflected in sections 7116 and 7118 of the Statute that unfair labor practices should be remedied. Suspension is also consistent with the intent of Congress reflected in section 7122(b) that arbitration awards should be given final and binding effect except where, on timely filed exceptions, the Authority finds that an award is deficient.

Moreover, the record in this case is replete with examples showing that the Union did not sleep on its rights in this matter but, rather, that it continuously and diligently sought to have the Arbitrator's September 23, 1983 award fully implemented by the Respondent through numerous requests, meetings and ULP charges. As to the charges, all four were essentially identical, alleging that the Respondent refused to fully comply with the Arbitrator's award in violation of the Statute. We note in particular that the Union's timely filed charge of April 23, 1984, was dismissed by the Regional Director and its appeal from that action was subsequently denied by the General Counsel essentially because the Respondent's exceptions to the Arbitrator's award were still pending before the Authority. On that basis, the Union, without fault and without a determination on the merits of its claim, was left without an actionable charge to redress the Respondent's refusal to fully implement the Arbitrator's award.

Under these unique circumstances, we have determined that the Respondent should not escape its obligation to fully comply with the Arbitrator's award, which required the payment of backpay to the affected employees. Accordingly, we conclude that the period for filing a ULP charge in this case was first tolled with the timely filing of the Union's April 23, 1984 charge, and that the running of the time period was thereafter suspended through the filing of the Union's fourth ULP charge February 11, 1985. It follows that the fourth charge was timely and not time-barred.

B. Refusal to Comply

On the merits of the complaint, there is no question that the Respondent failed to provide the backpay called for in Arbitrator Goodman's September 23, 1983 award. Any question which the Respondent had as to the legality of the award should have been raised through timely exceptions filed with the Authority pursuant to section 7122(a) of the Statute. As noted above, the Authority found the exceptions filed by the Respondent to be untimely. Therefore, the Arbitrator's award was final and binding and, as correctly found by the Judge, it cannot be collaterally attacked in an unfair labor practice proceeding. Department of the Treasury, United States Customs Service, New York Region, New York, New York, 21 FLRA No. 119 (1986); Military Sealift Command (Atlantic), 21 FLRA No. 111 (1986).

VI. Conclusion

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Authority has reviewed the rulings of the Judge made at the hearing, finds that no prejudicial error was committed, and affirms those rulings. The Authority has considered the Judge's Decision, the exceptions to that decision and the opposition to the exceptions, the positions of the parties, and the entire record, and adopts the Judge's findings, conclusion, and recommended Order as here modified. We therefore conclude that the Respondent's failure to pay the backpay required by the Arbitrator's award, which had become final and binding under section 7122(b) of the Statute in the absence of timely exceptions, constituted a failure to comply fully with the Arbitrator's award in violation of section 7116(a)(1) and (8) of the Statute.*/

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is ordered that the Department of the Air Force, Headquarters 832D Combat Support Group, DPCE, Luke Air Force Base, Arizona, shall:

1. Cease and desist from:

(a) Failing and refusing to fully implement Arbitrator David Goodman's arbitration award rendered on September 23, 1983.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Statute.

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*/ The Judge correctly found it unnecessary to pass upon the section 7116(a)(5) allegation of the complaint, and no exceptions were taken to his Decision in this regard.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Fully comply with Arbitrator David Goodman's September 23, 1983 arbitration award by making whole employees Trujillo and Gratz for the shift differential premium pay they lost from the time of their removal from the swing shift until they were returned to that shift on October 31, 1983.

(b) Post at its Luke Air Force Base facilities copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commanding Officer and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VIII, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

It is further ordered that the section 7116(a)(5) allegations of the complaint be dismissed.

Issued, Washington, D.C., December 31, 1986.

J. L. Calhoun

Jerry L. Calhoun, Chairman

Henry B. Frazier III

Henry B. Frazier III, Member

Jean McKee

Jean McKee, Member

FEDERAL LABOR RELATIONS AUTHORITY

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to fully implement Arbitrator David Goodman's arbitration award rendered on September 23, 1983.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Statute.

WE WILL fully comply with Arbitrator David Goodman's September 23, 1983 arbitration award by making whole employees Trujillo and Gratz for the shift differential premium pay they lost from the time of their removal from the swing shift until they were returned to that shift on October 31, 1983.

____
(Activity)

Dated: ____________ By: ____________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region VIII, Federal Labor Relations Authority, whose address is: 350 South Figueroa Street, 10th Floor, Los Angeles, California 90071, and whose telephone number is: (213) 894-3805.

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS 832D COMBAT
SUPPORT GROUP, DPCE
LUKE AIR FORCE BASE, ARIZONA

Respondent

and

Case No. 8-CA-50167

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
AFL-CIO, LOCAL 1547

Charging Party

. . . .

Lt. Col. Charles E. Brower, Esq.
For the Respondent

Ronald Wayman
Stanley Lubin, Esq., on brief
For the Charging Party

John R. Pannozzo, Jr., Esq.
Gerald M. Cole, Esq.
For the General Counsel

Before: JOHN H. FENTON
Chief Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. Section 7101 et seq., and the Rules and Regulations issued thereunder at 5 CFR 2411 et seq. It arose upon the filing of an unfair labor practice charge on February 11, 1985 by Local 1547. On April 4, 1985, the

Regional Director of Region VIII, Federal Labor Relations Authority issued a Complaint alleging that Respondent violated Sections 7116(a)(1), (5) and (8) of the Statute on September 5, 1984 and on January 10, 1985 and "continuing to date" by refusing to completely comply with an arbitration award. At issue is whether Respondent violated the law by refusing to make two employees whole for loss of night differential pay.

A hearing was held on May 8, 1985 in Phoenix, Arizona, at which the facts were largely stipulated. None of the facts relied upon herein was disputed.

Findings of Fact

1. On December 30, 1982, the Union grieved Respondent's decision to transfer the two civilian employees on its swing shift in the Pick-Up and Delivery Section of the Aerospace Ground Equipment Branch of the 405th Equipment Maintenance Squadron to the day shift. Employee Trujillo was assigned to the day shift on December 27, 1982, and employee Gratz was assigned on January 10, 1983. Both men thereby lost the night shift differential.

2. On September 23, 1983, Arbitrator David Goodman issued his Award, finding that Respondent had violated its contractual obligation to negotiate concerning the reassignments. Respecting the question of an appropriate remedy, the Arbitrator said:

> a return to status quo . . . remedy is embodied within the language of Article Vl, 3. which says "In no case" will a change be implemented until negotiations are completed. Thus, the Arbitrator is left with no choice but to order the parties back to where they were before the December 14, 1982 letter from Sergeant Williams (ordering the reassignment) . . . and to further order that the parties immediately meet and negotiate this change. (Parenthetical comment mine).

3. The Arbitrator, in addressing the remedy, made no explicit mention of backpay for Trujillo and Gratz, although he had asked the Union whether it wished him to make a determination respecting entitlement to backpay, and had been told that it did.

4. On October 19, Respondent informed the Union that it would return the men to the swing shift effective October 30, would reassign them to the day shift effective November 28, and that the Union should forward its proposals concerning the impact and implementation of the decision to return them to the day shift no later than November 1.

5. On October 20, Respondent told the Union that, in its opinion, the Arbitrator had not ordered backpay. On October 26, the Union responded that such position constituted noncompliance with the Award, which had become final upon expiration of the appeal period, and that backpay for the swing shift differential was continuing to accumulate.

6. Gratz and Trujillo were reassigned to the swing shift on October 31 and back to the day shift on November 28. In the interim Respondent twice restated its view that the Award made no provision for backpay.

7. On December 2, the Union unilaterally requested that the Arbitrator clarify his award with respect to the backpay issue, and on January 3, 1984 it filed an unfair labor practice charge alleging refusal to implement the Award.

8. On March 1, the Arbitrator advised the parties that:

> . . . the status quo remedy was clearly intended to require the Air Force to make these employees whole for all lost wages incurred when they were removed from the second shift. After all, only one meaning can attach to status quo - employees should be placed back to the position where they would have been but for a breach of the Agreement. Accordingly, the Employer is advised that those civilian employees on second shift at the time of the breach are entitled to the premium pay for the period of time they were denied access to the second shift.

9. On March 30, Respondent filed exceptions to the Arbitrator's "clarification" of his Award.

10. In April the Union withdrew its unfair labor practice charge, substituting another one apparently identical in its terms.

11. On July 13, the Regional Director refused to issue a complaint on the following grounds:

> The Charging Party asserts that the exceptions filed on March 30, 1984, were untimely and that the Authority has no jurisdiction to review the clarification because it is not a separate award. However, the Authority has held that exceptions filed on a clarification of an arbitrator's award will be accepted as timely provided that the deficiencies in the award did not arise until the clarification, and the exceptions are filed within the proper time period commencing on the date of the clarification. U.S. Department of the Interior, Bureau of Land Management, Eugene District Office, 6 FLRA No. 72 (1981). Moreover, any questions regarding the scope and nature of the Authority's jurisdiction to review the award should be first addressed by the Authority itself. Since the Authority has not yet issued its decision on the exceptions to this arbitration award, the Activity's failure to implement the award as clarified pending the Authority's decision is not violative of the Statute.

12. On July 27, the Federal Labor Relations Authority issued its Order Dismissing (Respondent's) Exceptions as untimely filed (15 FLRA No. 83). The Authority held that the arbitrator's March 1 letter had essentially advised the parties of the clear intent of the September 23 Award, rejecting the Agency's contention that such letter modified the Award and hence gave rise to the deficiencies alleged in its exceptions. The time for filing exceptions was therefore calculated from the date the September Award was served on the parties.

13. On September 5, Respondent reiterated its view that the September Award did not require backpay. The Union responded on September 10 by filing another unfair labor practice charge (8-CA-40459) alleging refusal to implement the Award. A Complaint was issued on November 27 but, for unexplained reasons the charge was withdrawn on January 3, 1985 and the Complaint dismissed on January 9.

14. On September 14, the Union by letter contended that Respondent's conduct constituted a contract violation, and requested a written response. On September 17, Respondent replied that it would be inappropriate to respond during the pendency of the Union's appeal from the Regional Director's refusal to issue Complaint.

15. On October 31, the General Counsel denied the Union's appeal. Noting that Section 2429.8(b) of the Authority's Rules provides for a stay of an arbitrator's award where timely exceptions are filed and a stay is requested, and that the exceptions were still pending at the time the Regional Director dismissed the charge, the General Counsel found noncompliance with the Award in such circumstances did not constitute an unfair labor practice.

16. On January 10, 1985, Respondent for the last time restated its opinion that the Award did not require it to pay Gratz and Trujillo backpay, and on February 11, the Union filed the instant unfair labor practice charge.

Conclusions of Law

Section 7122 provides that a party to arbitration must "take the actions required by an arbitrator's final award". Further, an award becomes final and binding when exceptions are not filed with the Authority "during the 30-day period beginning on the date the award is served on the party", or when the Authority issues its decision denying exceptions. Here Respondent did not file timely exceptions to the original award, and did not succeed with the exceptions filed to the Arbitrator's letter of "clarification". Rather, the Authority's Decision, noting that the Arbitrator had essentially advised the parties of the clear intent of his Award, dismissed the exceptions as untimely filed with respect to the date of the original award. As Respondent has refused to reimburse the employees for the premium pay they lost while denied access to the second shift, it clearly has failed to comply with Section 7122 in violation of Section 7116(a)(1) and (8).[1] Respondent's various defenses - that the Arbitrator was functus officio when he explicitly ordered backpay, that his supplemental action was secured by a unilateral and ex parte request, and that his Award is contrary to the Backpay Act - are matters which were subject to review by the Authority pursuant to Section 7122, and are not subject to collateral attack in this forum.[2] Nevertheless, the question remains whether the unfair labor practice charge, filed on February 11, 1985, can reach back to any act or event which constitutes an unfair labor practice.

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[1] United States Army Health Clinic, Ft. Ritchie, Maryland, 9 FLRA 935; United States Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, 15 FLRA 151. I do not pass on the Section 7116(a)(5) allegation, noting that in the latter case the Authority found it unnecessary to do so.

Section 7118(c)(4)(A) precludes issuance of a complaint "based on any alleged unfair labor practice which occurred more than 6 months before the filing of the charge with the Authority". Here, slightly more than six months elapsed between the issuance of the Authority's Order Dismissing Exceptions on July 27, 1984 and the filing of the charge on February 11, 1985. Literally read, that Order simply held that the time for filing exceptions expired on October 28, 1983, and thus the Award became final and binding some 15 months before the unfair labor practice charge was filed. I need not decide whether such was the case, or whether the subsequent proceedings before the Arbitrator and the Authority served to "toll" the running of the statute of limitations, for in either event the action which would arguably trigger the operation of Section 7118(a)(4)(A) occurred outside its six-month period. Hence Respondent's failure to implement the terms of the Award is actionable only if its conduct can be said to constitute a "continuing violation", i.e., it is deemed to violate the law on each and every day it remains in noncompliance, or a violation can somehow be said to have occurred in September of 1984 and January of 1985 when it restated its unwillingness to obey the Arbitrator.

The National Labor Relations Act contains, in Section 10(b), a limitations clause substantively identical to our own. It has spawned much of what is, perhaps sometimes loosely, termed "elucidating litigation" over the types of violations which are by nature "continuing", so as to escape the application of the limitations provision. Over the years the Labor Board has sought to fashion such violations, particularly with respect to employment discrimination and the bargaining obligation, and has met with mixed reviews from various U.S. Court of Appeals and from the U.S. Supreme Court. A brief look at that experience may be instructive.

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[2] United States Air Force, Air Logistics Command, Wright-Patterson Air Force Base, Ohio 15 FLRA No. 151; aff'd sub nom. Department of the Air Force v. FLRA, 775 F.2d 727 (CA 6); Veterans Administration Medical Center, Phoenix, Arizona, 15 FLRA 706.

The purpose of Section 10(b) is to bar litigation over past events "after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused."3/ The Supreme Court was there confronted with the question whether the Board had properly found a violation of the LMRA based upon the enforcement of a union-security clause which was valid on its face, but which had been executed well before the 10(b) cutoff date at a time when the union did not enjoy the majority status required by law. The Board found a violation based on the continuing enforcement of the union-security clause within the six-months limitations period, finding (or defining) the evidence respecting the legality of the contract's execution as admissible "background evidence" relevant to determining whether the conduct within six months of the unfair labor practice charge was unlawful.

The Supreme Court rejected this approach with the following analysis:

> It is doubtless true that § 10(b) does not prevent all use of evidence relating to events transpiring more than six months before the filing and service of an unfair labor practice charge. However, in applying rules of evidence as to the admissibility of past events, due regard for the purposes of § 10(b) requires that two different kinds of situations be distinguished. The first is one where occurrences within the six-month limitation period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose

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3/ Local Lodge 1424 v. NLRB, 362 U.S. 411, 45 LRRM 3212, 3216.

> § 10(b) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice.

From here the Court went on to examine a number of cases illustrating the extraordinary difficulty of applying these principles, and concluded that it need not express a view on them, for it was not required for present purposes to "go beyond saying that a finding of violation which is inescapably grounded on events predating the limitations period is directly at odds with the purposes of the § 10(b). proviso." Here, I think significantly, it dropped footnote 14, in responding to dissenting Justices Whittaker and Frankfurter,4/ wherein it said:

> Katz v. Labor Board, 196 F.2d 411, 30 LRRM 2063, and Labor Board v. Gaynor News Co., 197 F.2d 719, 30 LRRM 2340, relied on below and in dissent here, arose under provisions of the Act (§ 8(a)(3), 61 Stat. 140) since repealed (65 Stat. 601), which permitted union security agreements only with unions which possessed a Board certificate that a union security clause had been authorized at a special election of the employees involved. While the language, and perhaps the approach, of these cases may be considered inconsistent with the principles we deem governing here, the decisions on their facts present no such

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4/ Local Lodge, supra, 45 LRRM 3212, 3217.

> difficulty. Proof of the nonexistence of such a certificate, which of course was a continuing fact, plainly did not require resort to testimony about past events; rather the issue was much like one arising out of an agreement illegal on its face, the only difference being that a separate instrument was involved.

Here we face a virtually identical situation: proof of the existence of the obligation to implement the Arbitrator's award does not depend on recollections which have become dim and confused, or witnesses who have disappeared, but rather upon the existence of an instrument akin to the certificate involved in Katz and in Gaynor News - the Arbitrator's decision or the Authority's Order. In either event the separate instrument is readily available to establish Respondent's legal obligation, so that the policy underlying the statutory limitations period is not offended: i.e. there is no occasion to resort to the kinds of unreliable evidence precluded by Section 10(b) in order to establish an unfair labor practice predating the limitations period as a predicate for the unfair labor practice sought to be established within that period.

The NLRB has taken the same approach in cases involving the obligation to bargain, a subject more closely analogous to the present controversy. Where a union has been certified by the Board as the representative of a majority of employees in a collective bargaining unit, the Board will not, except in the rarest of circumstances, entertain any challenge to the continuing majority status of that union for a period of one year from the issuance of the certification. In such a situation, the Board has held a charge of refusal to bargain to be timely where it was filed within the certification year, although more than six months after the first bargaining request was made and unlawfully rejected.5/ Likewise the Board has held the repudiation

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5/ See, for example, Sewanee Coal Operators' Association, 167 NLRB 172. The Board found the first request to be a continuing one, at least for the duration of the certification year, noting that it would have been futile for the union to have "continuously repeated such requests thereafter." As an apparent safety measure, the Board also treated the charge which was filed more than six months after the refusal as tantamount to an explicit request to bargain, thus rendering simultaneous the last request/refusal to bargain and the filing of the charge.

of obligations arising under a collective bargaining agreement to constitute a continuing violation. Thus, it has held that the fact that the initial repudiation of an agreement occurred outside the Section 10(b) cutoff date does not absolve a respondent from the unfair labor practices which inure from its continuing failure, within such limitations period, upon demand to execute or abide by the agreement reached.6/ However, it limited statutory relief, i.e. it ordered that the terms of the collective bargaining agreement be applied retroactively only to the cutoff date.

The chief concern with such an approach is that it would, in like cases, render permanently inoperative the policy of protecting Respondents' against stale claims. At some point, it would seem, considerations of laches or waiver arguably ought to come into play.7/

On this record, I would give little weight to such considerations. Here the charge I find actionable was filed only a few weeks ago after expiration of the six months period following the Authority's final action on the case, and several weeks after the Union's final and futile demand that Respondent comply with the backpay provisions of the Award. Moreover, the Union had kept the controversy alive from the beginning with repeated requests for payment, and by diligently filing a series of unfair labor practice charges directed at Respondent's unwillingness fully to implement the Award.

6/ Anchor Rome Mills, 110 NLRB 956, enf'd 228 F.2d 775 (CA-5), 37 LRRM 2367; Al Bryant, Inc., 260 NLRB 128, 135, 109 LRRM 1284, enf'd 113 LRRM 3690 (CA-3). It is to be underscored that these cases involved repeat demands for compliance within six months of the filing of the unfair labor practice. See also, Tarrington Construction Co., 235 NLRB 1540, fn. 2.

7/ In recommending that the Authority not find the charge time-barred, I am not unaware of the Sixth Circuit's holding that "the limitation period for filing an unfair labor practice charge based on a refusal to implement an arbitration award begins to run on the date the award becomes final pursuant to § 7122(b)." U.S. Air Force v. FLRA, 775 F.2d 727, enfg. 15 FLRA 151. Neither the Court nor the Authority confronted the issued presented here. Rather, they read § 7122(b) as making a refusal to obey an award actionable only when it becomes "final and binding" upon expiration of the 30 days for filing exceptions.

As noted, the Union filed its first charge several months after the original Award, withdrew it, and filed an identical charge barely within six months of the date when that Award became "final". That charge was dismissed because of the then-pending exceptions to the Arbitrator's supplemental "decision", and the General Counsel, noting that a stay had been requested, sustained that dismissal. The Union may arguably be faulted for its withdrawal of a like charge filed after the Authority's Order, which had led to issuance of a complaint. However, its action, unexplained on this record, must be viewed against the confusion in the state of the law thus far elaborated under Section 7122.

Thus, it is not clear that an actionable charge could have been filed, based on the refusal to implement the Award, at any time before the Authority had disposed of the exceptions. A charge filed during the five-month period between the Award's becoming "final" (i.e., upon the lapse of 30 days free of exceptions), and the issuance of the Arbitrator's supplemental decision might well have been dismissed for essentially the same reasons that led to dismissal of the charge filed after his action: that it could not be known what was required of Respondent until the Arbitrator acted upon the request for clarification. Thereafter, of course, the pendency of exceptions and the associated stay precluded the filing of an actionable charge. A viable charge apparently could not have been filed prior to issuance of the Order Dismissing Exceptions, and the Order can literally be read as holding that any subsequent charge would be time-barred for the reasons the exceptions were: because the clock began to run on the thirteenth day after issuance of the original Award, some nine months before the Authority acted. These uncertainties of redress, and the Union's diligent pursuit of its claim, would appear to furnish equitable reasons not to dismiss the charge as one raising a stale claim.[8]

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[8] I have made Respondent's Citation of Supplemental Authority, filed on October 22, 1985, a part of the record herein, over Charging Party's objection. Rule 28(j) of the Federal Rules of Appellate Procedure permits receipt of such materials after briefs have been filed. However, I give no weight to such materials as they go to the merits of the Arbitrator's decision and his authority to "clarify" it, and are thus an attempt to collaterally attack his action in an unfair labor practice proceeding.

Lastly, Charging Party seeks, in addition to a conventional backpay order, an order directing that it be reimbursed for expenses, including legal fees. It rests it claim on the Respondent's "frivolous, indeed absurd" grounds for refusing to comply with the Arbitrator' Award and cites two celebrated private sector cases as grounds for such relief.[9] Aside from the fact that the violation here is in no way comparable to the egregious violations in those cases, I am unaware of any authority in the public sector to assess such expenses against the government, except for legal fees and associated expenses covered by the Back Pay Act and the Equal Access to Justice Act. The latter would not apply, but the former may. The relevant statutory provision is found at 5 U.S.C § 5596, which incorporates 5 U.S.C. § 7701(g), and the Authority has dealt with the issue in International Brotherhood of Electric Workers and United States Army Support Command, Hawaii, 14 FLRA 680. I take Section 5596(b)(1) to require an Authority decision sustaining my finding of entitlement to backpay, before an application for a fee is in order, and direct that, in such event, the parties follow the procedures, as relevant here, set forth in Part 2430 of the Rules and Regulations.

Having concluded that Respondent failed to comply with Section 7122 of the Statute in violation of Section 7116(a) (1) and (8), I recommend that the Authority enter the following:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the Department of the Air Force, Headquarters 832d Combat Support Group, DPCE, Luke Air Force Base, Arizona, shall:

1. Cease and desist from:

   (a) Failing and refusing fully to implement Arbitrator David Goodman's Arbitration Award rendered on September 23, 1983.

   (b) In any like or related manner interfering, restraining or coercing employees in the exercise of their rights assured by the Statute.

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[9] IUE v. NLRB, 440 F.2d 298 and UAW v. NLRB, 455 F.2d 1357.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Fully comply with Arbitrator David Goodman's September 23, 1983 Arbitration Award by making whole employees Gratz and Trujillo for the shift differential premium pay they lost from the time of their removal from the swing shift until they were returned to that shift on October 31, 1983.

(b) Post at its Luke Air Force Base facility, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commanding Officer, or his designee, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VIII, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

John H. Fenton

JOHN H. FENTON
Chief Administrative Law Judge

Dated: March 26, 1986
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse fully to implement Arbitrator David Goodman's Arbitration Award rendered on September 23, 1983.

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____
(Agency or Activity)

Dated: ________________ By: ____________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region VIII, whose address is: 350 South Figueroa Street, 10th Floor, Los Angeles, California 90071, and whose telephone number is: (818) 894-3805, FTS 8-798-3805.

*U.S.GOVERNMENT PRINTING OFFICE:1987-181-223:60003